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Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-908

KERR STEAMSHIP CO., INC., ET AL., *Petitioners*

-versus-

THE CITY OF GALVESTON, *Respondent*

PETITION FOR WRIT OF CERTIORARI
To The United States Court of Appeals
For The Fifth Circuit

ROBERT EIKEL
Counsel for Petitioners
1442 Esperson Building
Houston, Texas 77002

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

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Supreme Court of the United States

OCTOBER TERM, 1974

NO. _____

KERR STEAMSHIP CO., INC., ET AL., *Petitioners*

-versus-

THE CITY OF GALVESTON, *Respondent*

PETITION FOR WRIT OF CERTIORARI
To The United States Court of Appeals
For The Fifth Circuit

To The Honorable The Chief Justice And The Associate Justices Of The Supreme Court Of The United States:

Petitioners Kerr Steamship Co., Inc., Texas Transport & Terminal Co., Inc., Lykes Bros. Steamship Co., Inc., States Marine-Isthmian Agency, Inc., and Lone Star Shipping, Inc., pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above cause on November 5, 1974.

OPINIONS BELOW

The Court of Appeals (Appendix A, infra, p. A-1) affirmed without opinion the opinion of the District Court (ordering its opinion not to be published).

The opinion of the District Court (Appendix C, infra, p. A-4) is reported in 362 F.Supp. 289.

JURISDICTION

The judgment of the Court of Appeals (Appendix B, infra, p. A-2) was entered on November 5, 1974. Rehearing was not sought.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED FOR REVIEW

1.

This Court having expressly held in *State of California v. United States,* 320 U.S. 577 (1944), that the Federal Maritime Commission has the power by statute to regulate terminal operators and compel them to engage in non-discriminatory and reasonable practices, may a terminal operator (here the Galveston Wharves) ignore the provisions of the Federal Martime Commission General Order No. 15 (46 C.F.R. Part 533) and impose liability for wharf demurrage charges on steamship company *agents* which General Order No. 15 (46 C.F.R. §533.6(d)(4)) expressly declares are charges to be paid by *cargo* (i.e., shippers)?

2.

May a terminal operator (here a port authority) adopt tariff provisions expressly contrary to the regulations re-

quired by Federal Maritime Commission General Order No. 15, and collect from *agents* of steamship companies charges the Order expressly declares are to be made against *cargo,* under the guise of contending that agents are "users" of port facilities, where the General Order expressly defines "usage" (46 C.F.R. §533.6(d)(8)) as something completely different from the meaning of usage contained in the port tariff?

3.

Can a terminal operator collect charges not unambiguously provided for in its tariff filed with the Federal Maritime Commission, contrary to the settled principle of tariff construction that only those charges clearly set forth in the tariff can be collected?

4.

Has a terminal operator the power to ignore the express provisions of a Federal Maritime Commission Order and impose liability upon third persons, without any authority whatsoever being granted by the regulatory authority, such as is here done by imposing on third persons charges owed by others under the Commission Order, clearly in direct contravention of well-settled principles of law?

STATUTES AND REGULATIONS INVOLVED

The Shipping Act of 1916, September 7, 1916, c. 451, 39 Stat. 728, Sections 1, 15, 16, 17 and 18 (46 U.S.C.A. §§ 801, 814, 815, 816 and 817), and 46 C.F.R. Part 533, printed in appendix below, pages A-31 through A-36.

STATEMENT OF THE CASE

In essence the facts here are largely undisputed: There was a longshoremen's strike closing operations of all American East Coast and Gulf of Mexico deep-sea ports, which lasted in Texas ports, (including the Port of Galveston), from the expiration of the Taft-Hartley Act injunction on December 20, 1968, until April 1, 1969. During and immediately before and after this strike period cotton cargoes could not be moved off the docks of the Galveston Wharves, the strike being totally effective.

The City of Galveston, as owner and operator of the Galveston Wharves, filed separate suits to recover from petitioners *individually as steamship agents* wharf (pier) demurrage charges on the immovable cotton, upon the following basis: For cotton which was on free time on December 20, *no demurrage charge was made for the 104-day strike period* but the days of free time unused before the strike commenced were tacked onto the days before the cotton was moved off the piers after the end of the strike and wharf demurrage charges assessed thereafter at the tariff rates. For cotton caught on the piers on December 20 that were on reduced wharf demurrage charges (having been on the piers within the 5-day reduced wharf demurrage period but more than the 15-day free time period), wharf demurrage was assessed at the 5-day period reduced rate of 2½ cents during the strike period and until the cotton was shipped. For cotton whose 15-day free time plus 5-day reduced demurrage-rate period had expired before December 20, 1968 (i.e., was on the full, or penalty, wharf demurrage rate of 5 cents per bale when the strike commenced), demurrage was assessed

at a 2½ cent per bale rate during the strike period (and until the cotton was loaded out).

These demurrage charges were all billed to the vessel (its owners and agents) that loaded out the cotton after the strike ended, but suits were filed (and recovery allowed by the Courts below) *only against and from the vessels' agents, not* either the shippers or the vessels.

Wharf (Pier) Demurrage, What It Is

The Federal Maritime Commission General Order 15, 46 C.F.R. Part 533, defines wharf demurrage (denominated in the tariff of Galveston Wharves "pier" demurrage) as follows:

> "§533.6 *Definitions.*
>
> * * *
>
> (d) Definitions of terminal services:
>
> * * *
>
> (4) Wharf demurrage: A charge assessed against cargo remaining in or on terminal facilities after the expiration of free time unless arrangements have been made for storage."

The Galveston Wharves Provisions Relative to Pier Demurrage

The complete text of the pertinent provisions of the tariff of the Galveston Wharves relative to wharf demurrage (denominated "pier demurrage" in the tariff) is set forth in the Appendix, but the particularly pertinent portions of the tariff here at issue are as follows:

"Item 185—Rules and Charges:

Cargo . . . which is discharged into or onto the waterfront facilities of the Galveston Wharves . . . shall be subject to the following provisions . . .

(a) *Free Time Limitations*

On outbound cargo . . . intended for delivery to water carriers fifteen (15) running days . . . will be allowed free when such cargo is discharged into closed or shedded piers, and also when discharged in the open . . .

(b) *Pier Demurrage Charges*

After expiration of free time, the following pier demurrage charges will be assessed on cargo discharged into closed or shedded piers or warehouses or in open space.

Outbound

(1) . . .

(2) On cotton and/or cotton linters charges will be as follows:

2½¢ per bale for first five days.

5¢ per bale per day for the sixth day and for each succeeding day until removed."

The tariff in effect during the days in 1968 and 1969 for which the Courts below allowed recoveries of wharf demurrage charges *had no provisions for the rates for wharf demurrage charges collectible during the days of a strike when cargo could not be moved off the wharves.* Apparently realizing the illegality of charges not clearly set forth in its tariff, the Galveston Wharves in 1971 amended its tariff to provide for charges at the rates recovery of which was allowed herein, these provisions being as follows:

"INTERFERENCE DUE TO STRIKES	When it is impossible to remove cargo from Galveston Wharves' piers or transit sheds because of strike interference, cargo on piers or in transit sheds within the free time period will be allowed additional free time equal to period of such interference.	
	Cargo on piers or in transit sheds on which free time period has expired at beginning of such intereference will be assessed pier demurrage during period of interference at rate of 5¢ per ton per day except cotton and cotton linters which will be assessed 2-½¢ per bale per day.	187 New Item
	The first and last day on which any strike interference occurred, such day will be included in the above special provisions."	

(The Court is respectfully referred to Appendix H attached hereto where the newly-amended tariff sheet is reproduced.)

The Tariff Provisions Denominating Those Persons Responsible for Payment of Charges

The trial court held petitioners, who are only agents for their steamship company principals and who had no ownership interest whatsoever in the cotton cargoes against which the wharf demurrage charges were assessed.

liable for the demurrage charges under the following tariff provisions:

> "Item 30: *Responsibility for Charges, Etc.*
>
> The use of waterways and facilities under jurisdiction of the Board of Trustees of the Galveston Wharves shall constitute a consent to the terms and conditions of this tariff, and evidences an agreement on the part of all vessels, their owners and agents, and other users of such waterways and facilities, to pay all charges specified, including any and all damages to property as provided in Item 75, or reissues, and to be governed by all rules and regulations contained in this tariff."

and under

> "Item 185: *Rules and Charges*
>
> * * *
>
> (c) Pier Demurrage Rules:
>
> Inbound or outbound cargo remaining on the property of the Galveston Wharves after the expiration of free time will be subject to the following rules:
>
> (1) Pier demurrage charges on outbound cargo will be considered as for the account and responsibility of the vessel, their owners or their agents, individually or collectively."

By way of striking contrast, of critical importance to a lawful decision of this case it is respectfully submitted, the Federal Maritime Commission General Order 15 (in addition to the portion of the order defining wharf demurrage set forth above) refers to terminal facility

"usage" only where the person performs a service, as follows:

> "C.F.R. §533.6(d)(8):
>
> *Usage:* The use of terminal facilities by any rail carrier, lighter operator, trucker, shipper or consignee, their agents, servants and/or employees, when they perform their own car, lighter or truck loading or unloading, or the use of said facilities for any other gainful purpose for which a charge is not otherwise specified."

The suits, being civil actions arising under an Act of Congress regulating commerce, were within the original jurisdiction of the District Court by virtue of 28 U.S.C. §1337, and accordingly petitioners pursuant to the provisions of 28 U.S.C. §1441 removed the suits to the federal court.

ARGUMENT

REASONS FOR GRANTING THE WRIT

1.

In holding petitioners personally liable, as agents for steamship companies, for charges declared by the Federal Maritime Commission Order payable by cargo (i.e., owners of the cargo) the courts below have decided that terminal operators lawfully required by the Federal Maritime Commission to file tariffs may in such filed tariffs insert provisions directly in conflict with the terms of the Federal Maritime Commission Order, the courts below thus authorizing terminal operators to act in direct defiance of that regulatory body's Order.

Such holding is of general importance, granting terminal operators practically unlimited freedom at will to make charges against persons dealing with the terminal by simply providing for such liabilities by provisions contained in their filed tariffs.

Such holding is in direct conflict with the settled law that a gratuitous unilateral provision in a tariff not contemplated or required by statute is a nullity.

While usually a tariff is "ordinarily understood to be a system of rates and charges", *Pacific S.S. Co. v. Cackette*, 8 F.2d 259, 261 (9 Cir. 1925), cert. den. 269 U.S. 586 (1926), from which no deviation is allowed, having the force of law with the anomalous dignity of a statute, *Louisville & Nashville Ry. Co. v. Maxwell*, 237 U.S. 94, 97 (1915), and *State of Israel v. Metropolitan Dade County, Florida*, 431 F.2d 925, 928 (5 Cir. 1970), tariffs filed by terminal operators as "other persons" subject to the Shipping Act of 1916, 46 U.S.C. §801, 817, do not fall within such ordinary definition of a tariff.

Such terminal operators' tariffs do not fall within the rate-making authority of the Federal Maritime Commission. However,

> "The withholding of rate-making power for services other than water carriage does not qualify the unlimited grant to the Commission of the power to stop effectively all unjust and unreasonable practices in receiving, handling, storing or delivering property.",

it is expressly held in *State of California v. United States*, 320 U.S. 577, 584 (1944). And that case removed any doubt that publicly-owned port facilities such as those of respondent are subject to the lawful orders of the Federal Maritime Commission.

There can therefore be no contention made that the Commission's General Order 15, 46 C.F.R. Part 533, is not lawful. *City of Los Angeles v. Federal Maritime Commission,* 385 F.2d 678 (D.C. App. 1967).

It is settled law that only those tariff provisions are valid that are promulgated in accordance with the regulatory body's authority. As held in *Pacific S.S. Co. v. Cackette, supra,*

> "The public, in dealing with a common carrier, are bound to take notice that it has filed a tariff of rates and charges, and are chargeable with notice of everything *that is properly included in or related to* such system of rates and charges." (Emphasis added.)

Please see also the holding in *Port of Tacoma v. S.S. Duval,* 364 F.2d 615 (9 Cir. 1966), at page 617:

> ". . . The Port says that the tariff gave constructive notice to the owner and makes the no lien provisions of the charter ineffective under the provisions of the Shipping Act of 1916, 46 U.S.C. §§ 801-842 and of the Intercoastal Shipping Act of 1933, 46 U.S.C. §§ 843-848. It is settled, however, that such filing gives constructive notice only '* * of everything contained in such published tariff schedules *which is by law required to be therein inserted* * *.' Pacific S.S. Co. v. Cackette, 9 Cir., 1925, 8 F.2d 259, 260, cert. denied, 269 U.S. 586, 46 S.Ct. 203, 70 L.Ed. 426. . . ." (Emphasis added.)

Giving effect as the Courts below have done to Items 30 and 185 which impose "responsibility" (equated with "liability for") upon vessels, their owners and agents, for the wharf demurrage charges herein sued for is thus giving binding effect to unlawful tariff provisions, unlawful because directly contrary to the express language of the Federal Maritime Commission Order 15, which imposes

liability for such charges upon *cargo* (i.e., the owners of the cotton cargo here in question).

The holdings below are squarely in conflict, therefore, with the decision in *Boston & Maine R.R. v. Piper,* 246 U.S. 439 (1918), where it was held

> "While this provision was in the bill of lading, the form of which was filed with the railroad company's tariffs with the Interstate Commerce Commission, it gains nothing from that fact. The *legal* conditions and limitations in the carrier's bill of lading duly filed with the Commission are binding until changed by that body (Kansas Southern Ry. v. Carl, 227 U.S. 639, 654); but not so of conditions and limitations which are, *as is this one, illegal, and consequently void.*" (Emphasis added.)

2.

In holding liable for cargo's charges the petitioners, agents only of the on-carrying steamships and *not* either cargo owners nor representatives of cargo, the courts below have decided an important issue in conflict with the established principle of tariff construction that where the tariff is ambiguous or there is uncertainty as to which of two provisions should be given effect to, that construction will be adopted which is most favorable to the public, i.e., in favor of the shipper or patron and against the carrier.

This rule of construction is clearly laid down in *United States v. Gulf Refining Co.,* 268 U.S. 542 (1925), *Atlantic Coast Line R. Co. v. Atlantic Bridge Co.,* 57 F.2d 654, 655 (5 Cir. 1932), and *Chicago & N.W. Ry. Co. v. Wilcox Co.,* 68 F.2d 883, 885 (7 Cir. 1934), cert. den. 293 U.S. 560 (1934).

The Courts below found petitioners liable primarily upon the basis of tariff Item 185(c)(1), which reads:

> "Pier demurrage charges on outbound cargo will be considered as for the account and responsibility of the vessel, their owners and agents, individually and collectively.",

ignoring the definition of demurrage in Item 5(1), which reads

> *"Pier Demurrage or Wharf Demurrage:* A charge assessed against cargo remaining in or on terminal facilities after the expiration of free time unless arrangements have been made for storage."

Certainly the words "assessed against cargo" can only mean that the pecuniary charge is imposed upon the property and its owners. Black's Law Dictionary (4th Ed.), p. 149.

Surely the tariff provision stating that wharf demurrage is "assessed against cargo" is in conflict with the provision that the charge will be "for the account and responsibility of the vessel, their owners and their agents", or at worst the provisions are ambiguous and can lawfully afford no basis for imposing *liability* for the *cargoes'* charges on steamship vessels' *agents.*

3.

In holding the vessel agents personally liable for demurrage with respect to cargo transported under bills of lading to which they were not a party, the courts below have decided an important issue in conflict with the well-settled rule that an agent for a disclosed principal is not liable to a third person for acts within the scope of the agency.

It is unchallenged that petitioners, other than Lykes Bros. Steamship Co., Inc. (who was sued in its capacity as an agent), were at all times acting as agents for their disclosed principals, the vessel owners.

The principle of law that an agent for a disclosed principal is not liable to a third person for acts within the scope of the agency has long been established. *Whitman v. Wyman*, 101 U.S. 392, 396 (1880), where this Court stated

> "Where the principal is disclosed, and the agent is known to be acting as such, the latter cannot be made personally liable unless he agrees to be so."

(Nothing can be made of the Galveston Wharves tariff provision (Item 30) that use of wharf facilities constitutes consent to all terms of the tariff: Lawful tariff provisions do not rest upon any consensual agreements. *Louisville & Nashville Ry. Co. v. Maxwell*, 237 U.S. 94 (1915); *Lowden v. Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. 516 (1939). And usage, as defined by the Federal Maritime Commission Order 15, 46 C.F.R. §533(d)(8) means actual physical performance on the wharves of loading or unloading operations or other actual use of wharf facilities. How reasonably can it be contended that an *agent* "uses" wharf facilities where cotton is left on the wharves by cotton owners because it cannot be moved? And here again to define usage in terms other than as defined in the Commission Order would be unlawful.)

A decision directly dispositive of this question, and directly applicable to the circumstances of this instant case, is the carefully-considered holding by the three-judge federal court in *Middle Atlantic Conference v. United*

States, 353 F.Supp. 1109 (D.C. Dist. Col. 1972). There the court affirmed an order of the Interstate Commerce Commission prohibiting motor common carriers from specifying in their tariffs that warehousemen, steamship agents and others similarly situated, who as in this instant case of your petitioners were neither consignors nor consignees of cargo, were to be liable for demurrage charges of trucks being loaded or unloaded at their premises. In so holding the court stated at page 1121-2:

> "Certainly warehousemen are free to assume liability for detention charges by contractual undertaking and this is sometimes done through average demurrage areements to promote their own business and in some instances to obtain the benefits of lower detention costs for the benefit of their customers. However, absent any custom, statutory or contractual basis, for reasons heretofore stated, it would be unlawful to attempt unilaterally to impose such liability on a party outside the contract of transportation by means of a tariff approved by the Commission. A tariff is an inappropriate instrument to 'legislate' liability with respect to a nonconsenting party and we find that the Commission acted properly in declining to approve a tariff which purported to do so."

To the same point please see *Central R. Co. of New Jersey v. Anchor Line,* 219 Fed. 716, 718 (2 Cir. 1914), and *In Re Tidewater Coal Exch.,* 292 Fed. 225, 234 (S.D. N.Y. 1923), aff'd. 296 Fed. 701 (2 Cir. 1924), cert. den. 264 U.S. 596 (1923).

Petitioners here at no time were either consignors or consignees of the cotton cargoes against which demurrage was charged. On numerous occasions over the years petitioners advised respondent that cargo demurrage charges were the liability of, owed by, the shippers and not the

liability of petitioners, and there is no statutory or contractual basis for imposing such liability on petitioners other than the tariff at issue. Respondent may not lawfully impose a consensual liability by means of its tariff since it is "unlawful to attempt unilaterally to impose such liability on a party outside the contract of transportation by means of a tariff. . ."

CONCLUSION

In conclusion, it is respectfully submitted that the issues here involved warrant full consideration by this Court in that they involve issues of great importance to all shipping interests, and the decisions of the Courts below are directly at war with long-established principles of law. Should the decisions below be allowed to stand, there will be no limit to the various ports' attempts to collect all port charges of every character from those persons nearest at hand, the steamship companies' agents. (An example of such an attempt is shown by the provision of the Port of Corpus Christi, Texas, tariff, attached hereto as Appendix I.)

A writ of certiorari should be granted to review the decision of the United States Court of Appeals affirming without opinion the decision of the District Court, and upon review should be reversed either after hearing or alternatively upon certificate.

Respectfully so prayed,

ROBERT EIKEL
Counsel for Petitioners
1442 Esperson Building
Houston, Texas 77002

APPENDIX A

IN THE
UNITED STATE COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 73-3469

THE CITY OF GALVESTON,
Plaintiff-Appellants

versus

KERR STEAMSHIP CO., INC., ET AL.,
Defendants-Appellants

Appeal from the United States District Court for the Southern District of Texas

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(November 5, 1974)

Before DYER, SIMPSON and CLARK, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1] [2]

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1. See N.L.R.B. v. Amalgamated Clothing Workers of America, 5 Cir., 1970, 430 F.2d 966.
2. The district court opinion is in the publication process. See F. Supp.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1974

No. 73-3469

D. C. Docket No. CA-71-G-61; et als.

THE CITY OF GALVESTON,
Plaintiff-Appellee,

versus

KERR STEAMSHIP CO., INC., et al.,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Texas

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Before DYER, SIMPSON and CLARK, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment

of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that defendants-appellants pay to plaintiff-appellee, the costs on appeal to be taxed by the Clerk of this Court.

November 5, 1974

Issued as Mandate: Dec. 4, 1974

APPENDIX C

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

CIVIL ACTION No. 71-G-61

THE CITY OF GALVESTON,
Plaintiff

v.

KERR STEAMSHIP CO., INC., et al,
Defendants.

MEMORANDUM AND ORDER

In this consolidated case, the City of Galveston, as owner and operator of the Galveston Wharves, is suing five (5) separate steamship companies for pier demurrage on bales of cotton which were stranded on the wharves during a 103-day longshoremen strike in 1968 and 1969. The disputed charges are based on the rates contained in plaintiff's Tariff Circular No. 4-D. Defendants present several theories justifying their refusal to pay the charges.

Findings of Fact

1. On December 1, 1967, the Board of Trustees of the Galveston Wharves, acting on behalf of the City of Galveston, issued Tariff Circular No. 4-D, to be effective January 1, 1968. The Circular contained rules and regu-

lations governing the operation of the Galveston Wharves facility.

a. Item #5 of the Tariff defines pier demurrage or wharf demurrage as "A charge assessed against cargo remaining in or on its terminal facilities after the expiration of free time unless arrangements have been made for storage."

b. Item #30, titled Responsibility for Charges, provides,

> The use of waterways and facilities under jurisdiction of the Board of Trustees of the Galveston Wharves shall constitute a consent to the terms and conditions of this tariff, and evidences an agreement on the part of all vessels, their owners and agents, and other users of such waterways and facilities, to pay all charges specified, including any and all damages to property as provided in Item 75, or reissues, and to be governed by all rules and regulations contained in this tariff.

c. Plaintiff duly filed the tariff with the Federal Maritime Commission (sometimes referred to herein as F.M.C.). However, that body never formally approved or disapproved the tariff.

2. Defendants are Kerr Steamship Co., Inc., Texas Transport & Terminal Co., Inc., Lykes Brothers Steamship Co., Inc., States Marine-Isthmian Agency, Inc., and Lone Star Shipping, Inc. Defendants are agents for numerous ships which dock at Galveston. Lykes Brothers also owns and operates vessels. The responsibilities of vessel agents include securing a berth for incoming vessels and notifying the shipper of the out-bound cargo where and when

the vessel will arrive. Defendants are members of the West Gulf Maritime Association who collectively bargained the contract with the International Longshoremen Association. Negotiation of this contract was the subject of the strike by longshoremen in 1968-69.

3. Plaintiff computes pier demurrage after a vessel and its cargo has departed Galveston. A clerk reviews the ship's manifest at the steamship company office to determine the vessel's departure date and the nature of its cargo. Comparison with the report made by the shipper's agent reveals the time period during which a particular cargo remains on the docks.

4. Under Item #185 of the Tariff Circular No. 4-D, outbound cotton is allowed fifteen (15) days "free time" at the wharves during which no charge is made. Thereafter, plaintiff charges pier demurrage on cotton at a rate of 2-½¢ per bale per day for the first five days and 5¢ per bale per day for each day thereafter until removal.

5. Bills for demurrage contain the date loaded, date received, number of bales (if cotton), number of days of demurrage, rate per day, rate per bale and total charge. Bills are sent in the names of the vessel and of the steamship company at the latter's address because service of the bills on the departed vessel itself would be impractical.

6. Because the vast bulk of cargo is loaded within the allotted free time, demurrage is charged only infrequently. Accrual of demurrage usually results from action or inaction by either the shipper of the cargo or its agents, or the vessel or its agents.

7. It would be difficult if not impossible for plaintiff to determine which party is responsible for the accrual

of demurrage in every instance. In addition, determining which shipper owned a particular cargo would be time consuming. Charging defendant steamship companies is the only practical manner of billing this expense.

8. Defendants, as agents for the vessels, routinely pay demurrage when the vessel is at fault and then seek reimbursement from the vessel owner or charterer.

9. When the shipper or its agent is at fault, the defendant who is billed for the demurrage notifies the shipper's agent of the charge and refrains from paying Galveston Wharves until the shipper's agent has paid the defendant. Plaintiff is aware of the practice but does not acquiesce in it, being of the view that defendants are liable for demurrage regardless of who is responsible for the delay. There is clearly no agreement to await payment by the shipper or its agent. The parties have disputed the issue of defendant's liability for several years. Nevertheless, prior to this incident, and apparently because of the small charges involved, neither party has resorted to the courts or the Federal Maritime Commission for resolution of the dispute.

10. The strike by the International Longshoremen Association over the new contract began on December 20, 1968 and ended April 2, 1969. Plaintiff has no contract with the I.L.A. and accordingly, had no control over the strike or the negotiations. Defendants are members of the West Gulf Maritime Association, the other party to the I.L.A. contract, and thereby had some control over the strike's duration.

11. During the strike no cotton moved through the Port of Galveston. Neither plaintiff nor defendant could have secured the manpower necessary to load cotton on to or off of the wharves.

12. Subsequent to the strike's conclusion, plaintiff sent demurrage bills to defendants and other steamship companies. Demurrage was charged for the period of the strike as follows:

(1) Cotton on free time on December 20 remained on free time for the duration of the strike.

(2) Cotton which had been on the wharves for more than 15 but less than 20 days was assessed the 2-½¢ rate provided in the tariff.

(3) Cotton which had been on the wharves for more than 20 days was charged 2-½¢, rather than the 5¢ rate provided in the tariff.

At the conclusion of the strike, plaintiff resumed counting days for purposes of assessment of additional demurrage where appropriate.

13. The tariff does not provide for reduction or exemption of demurrage charges in the event of a strike. Plaintiff unilaterally decided to charge the reduced rates which it assessed. Under the terms of the tariff, plaintiff could have charged all cargo with demurrage at the usual, gradually increasing, rates for the duration of the strike. The decision to reduce the demurrage charge was rational, reasonable and nondiscriminatory.

Conclusions of Law

Tariff Circular No. 4-D is a valid and enforceable tariff. Although the tariff schedule was promptly filed with the Federal Maritime Commission, it was never formally approved by that body. Defendants claim the tariff is unenforceable until it has been approved by the F.M.C., citing Section 15 of the Shipping Act of 1916, 46 U.S.C.

§814 and this Court's opinion in *National Bank of North America v. S. S. Oceanic Ondine,* 315 F.Supp. 386 (S.D. Tex. 1972).

Section 15 provides in part that

> All agreements, modifications, or cancellations made after the organization of the Board, shall be lawful only when and as long as approved by the Board, and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation.

By its plain terms, Section 15 applies only to agreements between persons subject to the Act: (1) fixing or regulating transportation rates or fares; (2) giving or receiving special rates, accommodations or other special privileges or advantages; (3) controlling, regulating, preventing or destroying competition; (4) pooling or apportioning earnings, losses or traffic; (5) allotting ports or restricting or otherwise regulating the number and character of sailings between ports; (6) limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or, (7) in any manner providing for an exclusive, preferential or cooperative working arrangement. The statute defines agreement to include understandings, conferences and other arrangements.

The tariff in question was promulgated by the Galveston Wharves to govern the operation of the wharves facility. First, although the statute is to be construed most broadly, *Volkswagenwerk Akt. v. F.M.C.*, 390 U.S. 261 (1968), a tariff is obviously not a multi-party agreement. Nothing in the record suggests that this tariff is anything other than a set of rates, rules and regulations unilaterally

issued by the owner of the facility. Secondly, neither the tariff provisions relevant here, nor any other tariff provision, fit the categories enumerated in the statute. In *Rorie v. City of Galveston*, 471 S.W.2d 789 (Tex. 1971), the Texas Supreme Court adopted the view that Section 15 of the Shipping Act does not apply to a Galveston Wharves tariff. The court there enforced a provision in a predecessor to Circular No. 4-D against the claim of unenforceability for lack of F.M.C. approval under Section 15.

Counsel for the Federal Maritime Commission filed an amicus brief in the *Rorie* case supporting enforcement of the statute. Although the courts are the final authority on issues of statutory construction, *F.T.C. v. Colgate-Palmolive*, 380 U.S. 374, 385 (1965), the construction put on a statute by the agency charged with administering it is entitled to deference by the courts. *N.L.R.B. v. Hearst Publications*, 322 U.S. 111, 131 (1944). This is particularly so if the construction has been consistent and of long duration.

In the amicus brief, the Commission contended the tariff was not an agreement within the meaning of Section 15 but was instead governed by the Commission's General Order 15, 46 C.F.R. §533, issued pursuant to Sections 17 and 21 of the Shipping Act, 46 U.S.C. §§ 816, 820.[1] That order requires all persons carrying on the busi-

1. Section 17 of the Act, 46 U.S.C. §816 provides in part:
Every such carrier and every other person subject to this chapter shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property. Whenever the Board finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice.

ness of furnishing wharfs, docks, warehouses, or other terminal facilities to file a schedule or tariff showing all rates, charges, rules and regulations governing the operation of the facility with the F.M.C. The order does not require the Commission's explicit approval of any tariff. The Commission reviews the filed tariff, considers any objections and contacts the filing party if any changes are necessary. The predecessor to the Galveston tariff was challenged and upheld in *Selden & Co. v. Galveston Wharves,* 7 FMC 679, 1974 A.M.C. 1621 (1964).

The Commission's interpretation of the Act is obviously most reasonable. Section 15 (46 U.S.C. § 814) applies to a broad range of agreements between parties who are subject to the Act. This section requires filing and approval of such agreements by the Commission. Section 17 (46 U.S.C. § 816) and the Commission orders issued pursuant thereto apply to unilaterally fixed rates, rules and regulations. This section requires filing but no formal approval. Tariff Circular No. 4-D plainly falls into the second category; it must be filed but needs no formal approval to be enforceable.

This construction of the statute is supported by the testimony. The plaintiff's employee responsible for filing papers with the F.M.C. testified to a system of informal responses from the Commission if any questions or irreg-

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Section 21 of the Act, 46 U.S.C. §820 provides in part:

> The Federal Maritime Board and the Secretary of Commerce may require any common carrier by water, or other person subject to this chapter, or any officer, receiver, trustee, lessee, agent, or employee thereof, to file with it or him any periodical or special report, or any account, record, rate, or charge, or any memorandum of any facts and transactions appertaining to the business of such carrier or other person subject to this chapter.

These provisions apply to a public entity operating a terminal facility. *California v. United States,* 320 U.S. 572 (1944).

ularities are discerned in the filed document. The witness had never received either a formal approval or disapproval of a tariff provision. Given the tremendous number of rates, rules and regulations for each of many parties subject to the Act, this informal procedure is clearly a reasonable means of exercising supervision over maritime commerce.

This conclusion does not impeach the result in *National Bank of North America v. S. S. Oceanic Ondine,* supra, for two reasons. First, the primary reason for the Court's decision was the absence of equity in the claim made by the City of Galveston. Secondly, the city ordinance there in question had been neither filed nor approved by the F.M.C. *National Bank* is thus distinguishable from this case in that the ordinance was not filed. The ordinance was therefore unenforceable under either Section 15 (46 U.S.C. § 814) or Section 17 (46 U.S.C. § 816) and General Order 15. The Court adheres to its decision in *National Bank* but finds that case no bar to the conclusion here that Tariff Circular 4-D is valid and enforceable.

In accord with Item #30 of the Tariff, pier demurrage charges for cargo remaining beyond free time may be assessed against vessels and their agents.

Defendants refer to the Item #5 definition of pier demurrage as "a charge assessed against cargo remaining in or on terminal facilities after the expiration of free time unless arrangements have been made for storage." Defendants also point to other charges which are charged against the vessel. Defendants conclude that these definitions preclude plaintiff from charging vessels or vessel agents with pier demurrage.

The definitions only deal with the manner in which charges are accrued. They do not purport to establish which parties are liable for the charge. Liability for the various charges is fixed by Item #30 of the Tariff, quoted in Finding of Fact 1. Items #5 and #30 are neither conflicting nor ambiguous.

A provision with similar language to that of Item #30 was found effective and binding on the parties in *Selden & Co. v. Galveston Wharves,* supra.

Obviously, the charge which the City of Galveston assesses against a party must be reasonably related to the party's use of the facility. As discussed in Findings of Fact 5, 6 and 7, assessment of pier demurrage against the vessel's agent is a reasonable charge.

Defendants' practice of delaying payment of some demurrage bills until payment to the defendant by the shipper's agent has never been acquiesced in by plaintiff. (Finding of Fact 9) The principle of estoppel is therefore not applicable to defeat plaintiff's claim.

Payment of the pier demurrage charged is not excused by the longshoremen strike. By citation to *Restatement, Contracts* §461 and Williston, CONTRACTS §1951A (Jaeger ed. 1938), defendants suggest the applicability of the contract doctrine of impossibility of performance. According to defendants, the strike made it impossible to perform the contract by removing the cotton. Defendants argue that they should not be charged demurrage for the cotton which remained on the wharves when it was impossible to remove it.

Defendants' appeal to the impossibility of performance doctrine misconceives the purpose of a demurrage charge.

Because of its distinctive nature, "[f]requently demurrage is assessed and liability attaches although the delay is not caused by the assessed party." *Port Terminal Ry. Assn. v. Connell Rice & Sugar Co.*, 387 F.2d 355 at 357 (5th Cir. 1967).

Free time is a reasonable period during which it is contemplated that removal of the cargo will take place. As the charge for cargo which remains beyond the free time, demurrage, by definition, accrues when performance cannot be accomplished as contemplated. This failure of performance may be the fault of the vessel's agent or of other parties. It may result from equipment failure, weather, or governmental action. Many of the delaying events cannot be anticipated when the cargo is placed on the wharf. Accordingly, by its nature, demurrage is usually charged when an unforeseen event prevents performance, that is, removal of cargo within the free time. Demurrage is the rental charge made for occupation of the facility until performance can be completed.

It is therefore irrelevant to the imposition of demurrage that it is impossible to avoid incurring the expense, or that some other party caused the delay. Absence of fault will not excuse the liability. *Pennsylvania R.R. v. Moore-McCormack Lines, Inc.*, 370 F.2d 430 (2nd Cir. 1966). By use of the facility, a party must accept the potential liability for these expenses as imposed by the tariff. *Houston Belt & Terminal R.R. v. Connell Rice & Sugar Co.*, 411 F.2d 1220 (5th Cir. 1969).

Obviously the party seeking to impose the charge may not be responsible for the delay. *Port Terminal R.R. Assn. v. Connell Rice & Sugar Co.*, 387 F.2d 355 (5th Cir. 1967). This exception does not apply here because the City of Galveston clearly had no control over the strike.

Although defendants' liability is not dependent upon their responsibility for the strike, if either party is to be considered responsible, it is the defendants. As members of the West Gulf Maritime Association, they are signatories to the contract with the International Longshoremen Association which was the subject of the strike. It is more equitable that pier demurrage, as an expense of the strike, should be borne by a party to the collective bargaining, such as defendants, than by an entity completely powerless to prevent or terminate the strike, such as Galveston Wharves.

The other legal defenses urged by defendants lack merit and deserve no extended discussion.

The Court concludes that plaintiff, the City of Galveston, must prevail in its claim against the several defendants. Judgment shall issue for plaintiff for damages together with interest and attorneys' fees, as stipulated by the parties. Plaintiff shall prepare a judgment in accordance with this Memorandum and Order, approved as to form by defendants, and submit same to the Court within fifteen days.

The foregoing constitutes the Court's Findings of Fact and Conclusions of Law. Any finding of fact deemed to be a conclusion of law is adopted as such; any conclusion of law deemed to be a finding of fact is adopted as such.

The Clerk shall file this Memorandum and Order and furnish copies to all counsel.

DONE at Houston, Texas, this 20th day of July, 1973.

/s/ JAMES NOEL
Judge

APPENDIX D

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

C. A. NO. 71-G-61
(CONSOLIDATED)

THE CITY OF GALVESTON,
Plaintiff
vs.
KERR STEAMSHIP CO., INC.,
TEXAS TRANSPORT & TERMINAL CO., INC.,
LYKES BROTHERS STEAMSHIP CO., INC.,
STATES MARINE-ISTHMIAN AGENCY, INC., and
LONE STAR SHIPPING, INC.,
Defendants

JUDGMENT

This action came on for trial before the Court, Honorable James Noel, District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered;

It is ORDERED and ADJUDGED that the plaintiff, The City of Galveston, recover of and from the defendant, KERR STEAMSHIP CO., INC., the principal sum of THREE HUNDRED THIRTY-FIVE AND 40/100 DOLLARS ($335.40), together with interest to the date of Judgment in the amount of SEVENTY-EIGHT AND 81/100 DOLLARS ($78.81); from TEXAS TRANSPORT & TERMINAL CO., INC., the principal sum of THREE HUNDRED NINETEEN AND 62/100 DOLLARS ($319.62), together with interest to the date of

Judgment in the amount of SIXTY-FIVE AND 10/100 DOLLARS ($65.10); from LYKES BROTHERS STEAMSHIP CO., INC., the principal sum of THREE THOUSAND NINE HUNDRED FIFTY-FOUR AND 95/100 DOLLARS ($3,954.95), together with interest to the date of Judgment in the amount of EIGHT HUNDRED FIFTY AND 28/100 DOLLARS ($850.28); from STATES MARINE-ISTHMIAN AGENCY, INC., the principal sum of THREE THOUSAND SEVEN HUNDRED TWELVE AND 40/100 DOLLARS ($3,712.40), together with interest to the date of Judgment in the amount of EIGHT HUNDRED SEVENTY-TWO AND 40/100 DOLLARS ($872.40); and from LONE STAR SHIPPING, INC., the principal sum of FIVE THOUSAND NINE HUNDRED NINETY-SEVEN AND 96/100 DOLLARS ($5,997.96), together with interest to date of the Judgment in the amount of ONE THOUSAND FOUR HUNDRED NINE AND 51/100 DOLLARS ($1,409.51); all such amounts with interest thereon at the rate of six percent (6%) per annum from date of Judgment until paid, and for plaintiff's costs of action.

DATED at Houston, Texas, the 23rd day of August, 1973.

/s/ JAMES NOEL
Judge

APPROVED AS TO FORM:

McLEOD, ALEXANDER, POWEL & APFFEL, INC.

By /s/ BENJAMIN R. POWEL
Benjamin R. Powel
Attorneys for Plaintiff

EIKEL & DAVEY

By /s/ R. EIKEL
Attorneys for Defendants

APPENDIX E

TITLE 46

SHIPPING

§ 801. Definitions

When used in this chapter:

The term "common carrier by water in foreign commerce" means a common carrier, except ferryboats running on regular routes, engaged in the transportation by water of passengers or property between the United States or any of its Districts, Territories, or possessions and a foreign country, whether in the import or export trade: *Provided*, That a cargo boat commonly called an ocean tramp shall not be deemed such "common carrier by water in foreign commerce."

The term "common carrier by water in interstate commerce" means a common carrier engaged in the transportation by water of passengers or property on the high seas or the Great Lakes on regular routes from port to port between one State, Territory, District, or possession of the United States and any other State, Territory, District, or possession of the United States, or between places in the same Territory, District, or possession.

The term "common carrier by water" means a common carrier by water in foreign commerce or a common carrier by water in interstate commerce on the high seas or the Great Lakes on regular routes from port to port.

The term "other person subject to this chapter" means any person not included in the term "common carrier by water," carrying on the business of forwarding or furnish-

ing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water.

The term "person" includes corporations, partnerships, and associations, existing under or authorized by the laws of the United States, or any State, Territory, District, or possession thereof, or of any foreign country.

The term "vessel" includes all water craft and other artificial contrivances of whatever description and at whatever stage of construction, whether on the stocks or launched, which are used or are capable of being or are intended to be used as a means of transportation on water.

The term "documented under the laws of the United States", means "registered, enrolled, or licensed under the laws of the United States."

The term "carrying on the business of forwarding" means the dispatching of shipments by any person on behalf of others, by ocean-going common carriers in commerce from the United States, its Territories, or possessions to foreign countries, or between the United States and its Territories or possessions, or between such Territories and possessions, and handling the formalities incident to such shipments.

An "independent ocean freight forwarder" is a person carrying on the business of forwarding for a consideration who is not a shipper or consignee or a seller or purchaser of shipments to foreign countries, nor has any beneficial interest therein, nor directly or indirectly controls or is controlled by such shipper or consignee or by any person having such a beneficial interest. As amended Sept. 19, 1961, Pub.L. 87-254, § 1, 75 Stat. 522.

§ 814. Contracts between carriers filed with Commission; definition of "agreement"; approval, disapproval, etc. by Commission; unlawful execution of agreements; conference agreements and antitrust laws exemptions; civil actions for penalties; terminal leases exemption

Every common carrier by water, or other person subject to this chapter, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports, limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitiors, or to

operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this chapter, and shall approve all other agreements, modifications or cancellations. No such agreement shall be approved, nor shall continued approval be permitted for any agreement (1) between carriers not members of the same conference or conferences of carriers serving different trades that would otherwise be naturally competitive, unless in the case of agreements between carriers, each carrier, or in the case of agreements between conferences, each conference, retains the right of independent action, or (2) in respect to any conference agreement, which fails to provide reasonable and equal terms and conditions for admission and readmission to conference membership of other qualified carriers in the trade, or fails to provide that any member may withdraw from membership upon reasonable notice without penalty for such withdrawal.

The Commission shall disapprove any such agreement, after notice and hearing, on a finding of inadequate policing of the obligations under it, or of failure or refusal to adopt and maintain reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints.

Any agreement and any modification or cancellation of any agreement not approved, or disapproved, by the Commission shall be unlawful, and agreements, modifications, and cancellations shall be lawful only when and as long as approved by the Commission; before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation; except that tariff rates, fares,

and charges, and classifications, rules, and regulations explanatory thereof (including changes in special rates and charges covered by section 813a of this title which do not involve a change in the spread between such rates and charges and the rates and charges applicable to non-contract shippers) agreed upon by approved conferences, and changes and amendments thereto, if otherwise in accordance with law, shall be permitted to take effect without prior approval upon compliance with the publication and filing requirements of section 817(b) of this title and with the provisions of any regulations the Commission may adopt.

Every agreement, modification, or cancellation lawful under this section, or permitted under section 813a of this title, shall be excepted from the provisions of sections 1-11 and 15 of Title 15, and amendments and Acts supplementary thereto.

Whoever violates any provision of this section or of section 813a of this title shall be subject to a civil penalty of not more than $1,000 for each day such violation continues: *Provided, however,* That the penalty provisions of this section shall not apply to leases, licenses, assignments, or other agreements of similar character for the use of terminal property or facilities which were entered into before the date of enactment of this Act, and, if continued in effect beyond said date, submitted to the Federal Maritime Commission for approval prior to or within ninety days after the enactment of this Act, unless such leases, licenses, assignments, or other agreements for the use of terminal facilities are disapproved, modified, or canceled by the Commission and are continued in operation without regard to the Commission's action thereon. The Commission shall promptly approve, disapprove, can-

cel, or modify each such agreement in accordance with the provisions of this section.

As amended Oct. 3, 1961, Pub.L. 87-346, § 2, 75 Stat. 763; Feb. 29, 1964, Pub.L. 88-275, 78 Stat. 148; Aug. 29, 1972, Pub.L. 92-416, § 1(a), 86 Stat. 653.

§ 815. Discriminatory acts prohibited

It shall be unlawful for any shipper, consignor, consignee, forwarder, broker, or other person, or any officer, agent, or employee thereof, knowingly and willfully, directly or indirectly, by means of false billing, false classification, false weighting, false report of weight, or by any other unjust or unfair device or means to obtain or attempt to obtain transportation by water for property at less than the rates or charges which would otherwise be applicable.

It shall be unlawful for any common carrier by water, or other person subject to this chapter, either alone or in conjunction with any other person, directly or indirectly—

First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description or traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided,* That within thirty days after enactment of this Act, or within thirty days after the effective date or the filing with the Commission, whichever is later, of any conference freight rate, rule, or regulation in the foreign commerce of the United States, the Governor of any State, Commonwealth, or possession of the United States may file a protest with the Commission upon the ground that the rate, rule, or

regulation unjustly discriminates against that State, Commonwealth, or possession of the United States, in which case the Commission shall issue an order to the conference to show cause why the rate, rule, or regulation should not be set aside. Within one hundred and eighty days from the date of the issuance of such order, the Commission shall determine whether or not such rate, rule, or regulation is unjustly discriminatory and issue a final order either dismissing the protest, or setting aside the rate, rule or regulation.

Second. To allow any person to obtain transportation for property at less than the regular rates or charges then established and enforced on the line of such carrier by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means.

Third. To induce, persuade, or otherwise influence any marine insurance company or underwriter, or agent thereof, not to give a competing carrier by water as favorable rate of insurance on vessel or cargo, having due regard to the class of vessel or cargo, as is granted to such carrier or other person subject to this chapter.

Whoever violates paragraphs First and Third hereof shall be guilty of a misdemeanor punishable by a fine of not more than $5,000 for each offense.
As amended Oct. 3, 1961, Pub.L. 87-346, § 6, 75 Stat. 766; Aug. 29, 1972, Pub.L. 92-416, § 1(b), 86 Stat. 653.

§ 816. Discriminatory rates prohibited; supervision by Board

No common carrier by water in foreign commerce shall demand, charge, or collect any rate, fare, or charge which is

unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters of the United States as compared with their foreign competitors. When ever the Federal Maritime Board finds that any such rate, fare, or charge is demanded, charged, or collected it may alter the same to the extent necessary to correct such unjust discrimination or prejudice and make an order that the carrier shall discontinue demanding, charging, or collecting any such unjustly discriminatory or prejudicial rate, fare, or charge.

Every such carrier and every other person subject to this chapter shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property. Whenever the Board finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice. Sept. 7, 1916, c. 451, § 17, 39 Stat. 734; Ex. Ord.No. 6166, § 12, June 10, 1933; June 29, 1936, c. 858, §§ 204, 904, 49 Stat. 1987, 2016; 1950 Reorg.Plan No. 21, §§ 104(1), 305, 306, eff. May 24, 1950, 15 F.R. 3178, 64 Stat. 1274, 1277.

§ 817. Carriers in interstate commerce to establish, observe, and enforce reasonable rates and regulations; carriers in foreign commerce to file tariffs of rates and charges

(a) Every common carrier by water in interstate commerce shall establish, observe, and enforce just and reasonable rates, fares, charges, classifications, and tariffs, and just and reasonable regulations and practices relating thereto and to the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of

presenting, marking, packing, and delivering property for transportation, the carrying of personal, sample, and excess baggage, the facilities for transportation, and all other matters relating to or connected with the receiving, handling, transporting, storing, or delivering of property.

Every such carrier shall file with the Commission and keep open to public inspection, in the form and manner and within the time prescribed by the Commission, the maximum rates, fares, and charges for or in connection with transportation between points on its own route; and if a through route has been established, the maximum rates, fares, and charges for or in connection with transportation between points on its own route and points on the route of any other carrier by water.

No such carrier shall demand, charge, or collect a greater compensation for such transportation than the rates, fares, and charges filed in compliance with this section, except with the approval of the Commission and after ten days' public notice in the form and manner prescribed by the Commission, stating the increase proposed to be made; but the Commission for good cause shown may waive such notice.

Whenever the Commission finds that any rate, fare, charge, classification, tariff, regulation, or practice, demanded, charged, collected, or observed by such carrier is unjust or unreasonable, it may determine, prescribe, and order enforced a just and reasonable maximum rate, fare, or charge, or a just and reasonable classification, tariff, regulation, or practice.

(b) (1) From and after ninety days following October 3, 1961 every common carrier by water in foreign commerce and every conference of such carriers shall file

with the Commission and keep open to public inspection tariffs showing all the rates and charges of such carrier or conference of carriers for transportation to and from United States ports and foreign ports between all points on its own route and on any through route which has been established. Such tariffs shall plainly show the places between which freight will be carried, and shall contain the classification of freight in force, and shall also state separately such terminal or other charge, privilege, or facility under the control of the carrier or conference of carriers which is granted or allowed, and any rules or regulations which in anywise change, affect, or determine any part of the aggregate of such aforesaid rates, or charges, and shall include specimens of any bill of lading, contract of affreightment, or other document evidencing the transportation agreement. Copies of such tariffs shall be made available to any person and a reasonable charge may be made therefor. The requirements of this section shall not be applicable to cargo loaded and carried in bulk without mark or count, or to cargo which is softwood lumber. As used in this paragraph, the term "softwood lumber" means softwood lumber not further manufactured than passing lengthwise through a standard planing machine and crosscut to length, logs, poles, piling, and ties, including such articles preservatively treated, or bored, or framed, but not including plywood or finished articles knocked down or set up.

(2) No change shall be made in rates, charges, classifications, rules or regulations, which results in an increase in cost to the shipper, nor shall any new or initial rate of any common carrier by water in foreign commerce or conference of such carriers be instituted, except by the publication, and filing, as aforesaid, of a new tariff or

tariffs which shall become effective not earlier than thirty days after the date of publication and filing thereof with the Commission, and each such tariff or tariffs shall plainly show the changes proposed to be made in the tariff or tariffs then in force and the time when the rates, charges, classifications, rules or regulations as changed are to become effective: *Provided, however,* That the Commission may, in its discretion and for good cause, allow such changes and such new or initial rates to become effective upon less than the period of thirty days herein specified. Any change in the rates, charges, or classifications, rules or regulations which results in a decreased cost to the shipper may become effective upon the publication and filing with the Commission. The term "tariff" as used in this paragraph shall include any amendment, supplement or reissue.

(3) No common carrier by water in foreign commerce or conference of such carriers shall charge or demand or collect or receive a greater or less or different compensation for the transportation of property or for any service in connection therewith than the rates and charges which are specified in its tariffs on file with the Commission and duly published and in effect at the time; nor shall any such carrier rebate, refund, or remit in any manner or by any device any portion of the rates or charges so specified, nor extend or deny to any person any privilege or facility, except in accordance with such tariffs: *Provided, however,* That the Federal Maritime Commission may in its discretion and for good cause shown permit a common carrier by water in foreign commerce or conference of such carriers to refund a portion of freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper where it

appears that there is an error in a tariff of a clerical or administrative nature or an error due to inadvertance in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers: *Provided further,* That the common carrier by water in foreign commerce or conference of such carriers has, prior to applying for authority to make refund, filed a new tariff with the Federal Maritime Commission which sets forth the rate on which such refund or waiver would be based: *Provided further,* That the carrier or conference agrees that if permission is granted by the Federal Maritime Commission, an appropriate notice will be published in the tariff, or such other steps taken as the Federal Maritime Commission may require, which give notice of the rate on which such refund or waiver would be based, and additional refunds or waivers as appropriate shall be made with respect to other shipments in the manner prescribed by the Commission in its order approving the application: *And provided further,* That application for refund or waiver must be filed with the Commission within one hunderd and eighty days from the date of shipment.

(4) The Commission shall by regulations prescribe the form and manner in which the tariffs required by this section shall be published and filed; and the Commission is authorized to reject any tariff filed with it which is not in conformity with this section and with such regulations. Upon rejection by the Commission, a tariff shall be void and its use unlawful.

(5) The Commission shall disapprove any rate or charge filed by a common carrier by water in the foreign commerce of the United States or conference of carriers which, after hearing, it finds to be so unreasonably high

or low as to be detrimental to the commerce of the United States.

(6) Whoever violates any provision of this section shall be subject to a civil penalty of not more than $1,000 for each day such violation continues.

As amended Oct. 3, 1961, Pub.L. 87-346, § 4, 75 Stat. 764; Aug. 22, 1963, Pub.L. 88-103, 77 Stat. 129; Oct. 30, 1965, Pub.L. 89-303, 79 Stat. 1124; Apr. 29, 1968, Pub.L. 90-298, 82 Stat. 111; Aug. 29, 1972, Pub.L. 92-416, § 1(c), 86 Stat. 653.

APPENDIX F

(46 CODE OF FEDERAL REGULATIONS)

PART 533—FILING OF TARIFFS BY TERMINAL OPERATORS

Sec.

533.1 Scope.
533.2 Purpose.
533.3 Persons who must file.
533.4 Filing of tariffs and tariff changes.
533.5 Compliance with this part and other terminal tariff filing requirements.
533.6 Definitions.

AUTHORITY: The provisions of this Part 533 issued under secs. 17, 21, 43; 46 U.S.C. 816, 820 and 841a.

SOURCE: The provisions of this Part 533 contained in General Order 15, 30 F.R. 12682, Oct. 5, 1965, unless otherwise noted.

§ 533.1 Scope.

This part sets forth rules and regulations for the filing of terminal tariffs by persons engaged in carrying on the business of furnishing wharfage, dock, warehouse or other terminal facilities within the United States or a commonwealth, territory, or possession thereof, in connection with a common carrier by water in the foreign commerce of the United States or in interstate commerce on the high seas or the Great Lakes.

§ 533.2 Purpose.

The purpose of this part is to enable the Commission to discharge its responsibilities under section 17, Shipping Act, 1916, by keeping informed of practices and rates

and charges related thereto, instituted and to be instituted by terminals, and by keeping the public informed of such practices.

§ 533.3 Persons who must file.

Every person other than the Department of Defense, including the military department and all agencies of the Department of Defense, carrying on the business of furnishing wharfage, dock, warehouse, or other terminal facilities as described in § 533.1, including, but not limited to terminals owned or operated by States and their political subdivisions; railroads who perform port terminal services not covered by their line haul rates; common carriers who perform port terminal services; and warehousemen who operate port terminal facilities, shall file in duplicate with the Bureau of Domestic Regulation, Federal Maritime Commission, and shall keep open to public inspection at all its places of business a schedule or tariff showing all its rates, charges, rules, and regulations relating to or connected with the receiving, handling, storing, and/or delivering of property at its terminal facilities: *Provided, however,* That rates and charges for terminal services performed for water carriers pursuant to negotiated contracts, and for storage of cargo and services, incidental thereto by public warehousemen pursuant to storage agreements covered by issued warehouse receipts need not be filed for purposes of this part.

[G.O. 15, Amdt. 11, 32 F.R. 7915, June 1, 1967]

§ 533.4 Filing of tariffs and tariff changes.

Every tariff or tariff change shall be filed on or before its effective date, except as required by Commission Order or agreements approved pursuant to section 15, and be

kept open for public inspection as provided in § 533.3. Initial tariff filings required by this part shall be filed within one hundred and eighty (180) days after the effective date of this part. Tariffs on file with the Commission on the effective date of this part need not be republished or refiled but shall be amended within one hundred and eighty (180) days after the effective date of this part to conform to the provisions hereof.

§ 533.5 Compliance with this part and other terminal tariff filing requirements.

Persons who file tariffs pursuant to requirements of Commission Orders or approved section 15 agreements shall not be relieved of such requirements by this part. Terminal Operators who file tariffs with the Interstate Commerce Commission pursuant to statute or rule of that Commission may satisfy the requirements of this part by filing with the Federal Maritime Commission a copy of any such tariff filed with the Interstate Commerce Commission.

[G.O. 15, 30 F.R. 12682, Oct. 5, 1965, as amended by Amdt. 1, 31 F.R. 8816, June 24, 1966]

§ 533.6 Definitions.

(a) The definitions of terminal services set forth in paragraph (d) of this section shall be set forth in tariffs filed pursuant to this part: *Provided, however,* That other definitions of terminal services may be used if they are correlated by footnote or other appropriate method to the definitions set forth herein. Any additional services which are offered shall be listed and charges therefor shall be shown in terminal tariffs.

(b) These definitions shall apply to "port terminal facilities" which are defined as one or more structures comprising a terminal unit, and including, but not limited to wharves, warehouses, covered and/or open storage space, cold storage plants, grain elevators and/or bulk cargo loading and/or unloading structures, landings, and receiving stations, used for the transmission, care and convenience of cargo and/or passengers in the interchange of same between land and water carriers or between two water carriers.

(c) For the purpose of this section, "point of rest" shall be defined as that area on the terminal facility which is assigned for the receipt of inbound cargo from the ship and from which inbound cargo may be delivered to the consignee, and that area which is assigned for the receipt of outbound cargo from shippers for vessel loading.

(d) Definitions of terminal services:

(1) Dockage: The charge assessed against a vessel for berthing at a wharf, pier, bulkhead structure, or bank, or for mooring to a vessel so berthed.

(2) Wharfage: A charge assessed against the cargo or vessel on all cargo passing or conveyed over, onto, or under wharves or between vessels (to or from barge, lighter, or water), when berthed at wharf or when moored in slip adjacent to wharf. Wharfage is solely the charge for use of wharf and does not include charges for any other service.

(3) Free time: The specified period during which cargo may occupy space assigned to it on terminal property free of wharf demurrage or terminal storage charges

immediately prior to the loading or subsequent to the discharge of such cargo on or off the vessel.

(4) Wharf demurrage: A charge assessed against cargo remaining in or on terminal facilities after the expiration of free time unless arrangements have been made for storage.

(5) Terminal storage: The service of providing warehouse or other terminal facilities for the storing of inbound or outbound cargo after the expiration of free time, including wharf storage, shipside storage, closed or covered storage, open or ground storage, bonded storage and refrigerated storage, after storage ararngements have been made.

(6) Handling: The service of physically moving cargo between point of rest and any place on the terminal facility, other than the end of ship's tackle.

(7) Loading and unloading: The service of loading or unloading cargo between any place on the terminal and railroad cars, trucks, lighters or barges or any other means of conveyance to or from the terminal facility.

(8) Usage: The use of terminal facility by any rail carrier, lighter operator, trucker, shipper or consignee, their agents, servants, and/or employees, when they perform their own car, lighter or truck loading or unloading, or the use of said facilities for any other gainful purpose for which a charge is not otherwise specified.

(9) Checking: The service of counting and checking cargo against appropriate documents for the account of the cargo or the vessel, or other person requesting same.

(10) Heavy lift: The service of providing heavy lift cranes and equipment for lifting cargo.

NOTE: The reporting and/or recordkeeping requirements contained herein have been approved by the Office of Management and Budget in accordance with the Federal Reports Act of 1942.

APPENDIX G

ORIGINAL TITLE PAGE

Board of Trustees of the

Galveston Wharves

TARIFF CIRCULAR NO. 4-D

(Cancels Tariff Circular No. 4-C)

NAMING

Rules and Regulations

GOVERNING

Dockage, Shed Hire, and Other Services and Charges Applying at the Facilities of the Galveston Wharves.

Issued December 1, 1967	Effective January 1, 1968

C. S. DEVOY
General Manager
802 - 25th Street
GALVESTON, TEXAS
77550

Issued by
CARL S. PARKER, JR.
Traffic Manager
802 - 25th Street
GALVESTON, TEXAS
77550

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BOARD OF TRUSTEES OF THE
GALVESTON WHARVES

TARIFF CIRCULAR NO. 4-D

Section 1

General Information, Rules and Regulations

SUBJECT	APPLICATION	ITEM NO.
	Words and terms used in this tariff, and all other Galveston Wharves tariffs, are defined as follows:	
	(a) ARRIVAL AT BERTH: The time at which an incoming vessel moors to her berth.	
	(b) BERTH: A section of a wharf or other mooring facility at which a vessel may moor.	
	(c) CHECKING: The service of counting cargo against appropriate documents for the account of the cargo or the vessel, or other person requesting same.	
	(d) DAY: In computing charges, a period of twenty-four (24) consecutive hours, or fraction thereof, of any calendar day or days.	
D	(e) DEPARTURE FROM BERTH: The time at which an outgoing vessel leaves her berth.	
E	(f) DOCKAGE: The charge assessed against a vessel for berthing at a wharf, pier, bulkhead structure, or for mooring to a vessel so berthed based upon the gross registered tonnage of vessel. The vessels, their owners or agents are responsible for the charge.	
F		
I		
N	(g) FREE TIME: The specified period during which cargo may occupy space assigned to it on terminal property free of wharf demurrage or terminal storage charges immediately prior to the loading or subsequent to the discharge of such cargo on or off the vessel.	5 (Cont.)
I		
T	(h) HANDLING: The service of physically moving cargo between point of rest and any place on the terminal facility, other than the end of ship's tackle.	
I		
O	(i) HEAVY LIFT: The service of providing heavy lift cranes and equipment for lifting cargo.	
N	(j) LOADING & UNLOADING: The service of loading or unloading cargo between any place on the terminal and railroad cars or trucks.	
S		
	▲(k) PIER ASSIGNMENTS: The wharves and sheds may be preferentially assigned. Preferential assignments will not be considered absolute to the total exclusion of other vessels which the Galveston Wharves may deem proper to assign to such space. It shall be understood, however, that the Galveston Wharves will not undertake to make use of such preferentially assigned space for other vessels, except when the same, in its opinion, is not being made use of by the party to whom it is assigned, or when the Galveston Wharves deems that any particular necessity demands it.	
	(l) PIER DEMURRAGE OR WHARF DEMURRAGE: A charge assessed against cargo remaining in or on terminal facilities after the expiration of free time unless arrangements have been made for storage.	
	▲ Change resulting in neither an increase nor a decrease.	

ISSUED: September 23, 1968 EFFECTIVE: October 30, 1968

C. S. DEVOY
General Manager
802 - 25th Street
GALVESTON, TEXAS 77550

Issued by
CARL S. PARKER, JR.
Traffic Manager
802 - 25th Street
GALVESTON, TEXAS 77550

Original Page 5

BOARD OF TRUSTEES OF THE
GALVESTON WHARVES

TARIFF CIRCULAR NO. 4-D

Section 1

General Information, Rules and Regulations

SUBJECT	APPLICATION	ITEM NO.
DEFINITIONS	(a) POINT OF REST: That area on the terminal facilities of Galveston Wharves which is assigned for the receipt of inbound cargo from the ship and from which inbound cargo may be delivered to the consignee, and that area which may be assigned for the receipt of outbound cargo from shippers for vessel loading. (n) SHED RENT: A charge assessed against vessels for the use of covered wharves or piers based upon the net registered tonnage of vessels. This charge is in addition to the dockage charge. The vessels, their owners, or their agents, are responsible for the charge. (o) TERMINAL STORAGE: The service of providing warehouse or other terminal facilities for the storing of inbound or outbound cargo after the expiration of free time, including wharf storage, shipside storage, closed or covered storage, open or ground storage, bonded storage and refrigerated storage, after storage arrangements have been made. (p) USAGE: The use of terminal facility by any rail carrier, lighter operator, trucker, shipper or consignee, their agents, servants and/or employees, when they perform their own car, lighter or truck loading or unloading, or the use of said facilities for any other gainful purpose for which a charge is not otherwise specified. (q) VESSEL: Except as otherwise provided, the term "VESSEL" include ships and barges. (r) VOYAGE: For the purpose of this tariff circular, a vessel's voyage is completed when she departs from ports known as the Galveston District. (s) WHARF OR MOORING: Where the word "Wharf" or "Mooring" appears it shall be understood that it includes dock or pier. (t) WHARFAGE: A charge assessed against the cargo or vessel on all cargo passing or conveyed over, onto, or under wharves or between vessels (to or from barge, lighter, or water), when berthed at wharf or when moored in slip adjacent to wharf. Wharfage is solely the charge for use of wharf and does not include charges for any other service.	5

ISSUED: December 1, 1967

EFFECTIVE: January 1, 1968

C. S. DEVOY
General Manager
802 - 25th Street
GALVESTON, TEXAS 77550

Issued by
CARL S. PARKER, JR.
Traffic Manager
802 - 25th Street
GALVESTON, TEXAS 77550

Original Page 4

BOARD OF TRUSTEES OF THE
GALVESTON WHARVES

TARIFF CIRCULAR NO. 4-D

Section 1

General Information, Rules and Regulations

SUBJECT	APPLICATION	ITEM NO.
HOLIDAYS	Where the word "Holiday" appears, it shall be understood to include the following named days: New Year's Day ..... January 1st Washington's Birthday ..... February 22nd Texas Independence Day ..... March 2nd Decoration Day ..... May 30th Emancipation Day ..... June 19th Independence Day ..... July 4th Labor Day ..... First Monday in September Armistice Day ..... November 11th Thanksgiving Day ..... Fourth Thursday in November Christmas Day ..... December 25th Holidays falling on Sunday will be observed the following day.	10
TIME RATES AND CHARGES BECOME EFFECTIVE	All charges shown in this Tariff Circular become effective (except as otherwise provided upon the arrival of a vessel at any wharf or mooring. Time to be computed from the actual hour of berthing and each succeeding twenty-four (24) hours, or fraction thereof, after hour of berthing will be considered a full day.	15
STRAIGHT RUNNING TIME	Vessels berthing at wharves or moorings of Galveston Wharves and paying charges as shown herein, will be considered on the same voyage even though departing for ports of Houston, Texas City or Baytown, Texas. The running time will cease when vessel departs from wharves or moorings of Galveston Wharves and time taken up where left off upon return of vessel.	20
ASCERTAINMENT OF VESSELS	Dockage shall be charged on the gross registered tonnage of the vessel as shown in Lloyd's Register of Shipping. Where additional gross tonnages are assigned to certain vessels, the highest of all such tonnages shown in Lloyd's Register of Shipping shall be applicable in determining gross tonnage for the purpose of assessment of dockage charges under this tariff circular. However, the Galveston Wharves reserves, without question, the right to admeasure any vessel when deemed necessary, and use such measurements as the basis of the charge.	25 ▲
RESPONSIBILITY FOR CHARGES, ETC.	The use of waterways and facilities under jurisdiction of the Board of Trustees of the Galveston Wharves shall constitute a consent to the terms and conditions of this tariff, and evidences an agreement on the part of all vessels, their owners and agents, and other users of such waterways and facilities, to pay all charges specified, including any and all damages to property as provided in Item 75, or reissues, and to be governed by all rules and regulations contained in this tariff.	30
	▲ Denotes change in wording resulting in neither an increase nor a decrease.	

ISSUED: December 1, 1967 EFFECTIVE: January 1, 1968

C. S. DEVOY
General Manager
802 - 25th Street
GALVESTON, TEXAS 77550

Issued by
CARL S. PARKER, JR.
Traffic Manager
802 - 25th Street
GALVESTON, TEXAS 77550

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BOARD OF TRUSTEES OF THE
GALVESTON WHARVES

TARIFF CIRCULAR NO. 4-D

Section 2

Charges which will be assessed against vessels or other parties engaged in the handling of import, export and Coastwise or intercoastal traffic, Also traffic to or from American Possessions

SUBJECT	PIER DEMURRAGE RULES AND CHARGES	ITEM NO.
RULES AND CHARGES	The waterfront warehouses, docks and piers of the Galveston Wharves are designed primarily for use in the handling of cargo interchanged between railroads, trucks and water carriers, on the one hand, and vessels and barges, on the other, and these waterfront facilities are not intended to be used for the storage of freight. Cargo, except bulk crude sulphur, which is discharged into or onto the waterfront facilities of the Galveston Wharves from railroad cars, trucks and/or water carriers, shall be subject to the following provisions: (a) FREE TIME LIMITATIONS On outbound cargo, except bulk crude sulphur, intended for delivery to water carriers, fifteen (15) running days, Saturdays, Sundays and Holidays being included, will be allowed free when such cargo is discharged into closed or shedded piers, and also when discharged in the open (See Exceptions 1, 3, 4 and 5). Free time will begin on the day that the cargo is discharged. On inbound cargo, except bulk crude sulphur, ten (10) running days, Saturdays, Sundays and Holidays being included, will be allowed free when such cargo is discharged from vessels or barges. Free time will begin the next 7:00 a.m. after the day the vessel or barge completes discharging such inward cargo (see Exceptions 2, 3 and 5). Cargo discharged from vessels and later reloaded aboard the same or other vessels, shall be subject to the free time rule applying on outbound cargo. Exception 1: On cargo owned, handled or controlled by the United States Department of Agriculture thirty (30) running days, Saturdays, Sundays and Holidays being included, will be allowed free when such cargo is discharged and stored in the open. Exception 2: Fifteen (15) running days free time (excluding Saturdays, Sundays and Holidays (see Item 10) will be allowed on inbound shipments of Rubber, Guayule, crude or natural, Pulp, Cellophane and/or Woodpulp. Exception 3: Cargo not susceptible to weather damage may be assigned open space for a free time period of thirty (30) days, inclusive of Saturdays, Sundays and Holidays. The free time accorded under provision of this exception will be subject to the availability of suitable open space and to the making of arrangements for the use thereof is advance of arrival of the cargo at this port. Exception 4: FREE TIME PERIOD applicable to outbound cargo may be extended an additional fifteen (15) days for assembly of single consignments of not less than 3,000 net tons. This provision is subject to the availability of space, and to the making of arrangements for the use thereof in advance of arrival at Galveston. Exception 5: Thirty (30) calendar days free time will be allowed on import and export cargo handled over the second floor of Pier 41. Arrangements for the use of this facility must be made with the General Manager in advance of cargo arrival at the port, because of limited access to and from shipside and other physical restrictions as to type of cargo that can be accommodated.	185 (Cont.)

ISSUED: December 1, 1967

EFFECTIVE: January 1, 1968

C. S. DEVOY
General Manager
602 - 25th Street
GALVESTON, TEXAS 77550

Issued by
CARL S. PARKER, JR.
Traffic Manager
602 - 25th Street
GALVESTON, TEXAS 77550

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BOARD OF TRUSTEES OF THE
GALVESTON WHARVES

TARIFF CIRCULAR NO. 4-D

Section 2

Charges which will be assessed against vessels or other parties engaged in the handling of import, export and Coastwise or intercoastal traffic, Also traffic to or from American Possessions.

SUBJECT	PIER DEMURRAGE RULES AND CHARGES	ITEM NO.
RULES AND CHARGES	(b) PIER DEMURRAGE CHARGES: After expiration of free time, the following pier demurrage charges will be assessed on cargo discharged into closed or shedded piers or warehouses or in open space. OUTBOUND: (1) On cargo except cotton and/or cotton linters, 10 cents (10c) per net ton for each seven (7) days or fraction thereof. (2) On cotton and/or cotton linters charges will be as follows: 2½c per bale per day for first five days. 5c per bale per day for the sixth day and for each succeeding day until removed. INBOUND: 5c per net ton per day for each of the first seven (7) days. 10c per net ton per day for eighth (8th) day and each succeeding day until removed. OPEN STORAGE: ♦ 5c per net ton for each seven (7) days or fraction thereof. Inbound cargo discharged from vessels, and subsequently loaded aboard the same or other vessels, are subject to pier demurrage charges and rules applicable on outbound cargo. Pier demurrage charges accruing against outbound cargo terminate the day next preceding commencement of loading on vessel. Pier demurrage charges accruing against inbound cargo terminate the day next preceding the removal from wharves or premises. (c) PIER DEMURRAGE RULES: Inbound or outbound cargo remaining on the property of the Galveston Wharves after the expiration of free time will be subject to the following rules: (1) Pier demurrage charges on outbound cargo will be considered as for the account and responsibility of the vessel, their owners or their agents, individually or collectively. (2) Pier demurrage charges on inbound cargo will be considered as for the account and responsibility of the owner of the cargo, the shipper, the receiver or their agents, individually or collectively. ♦ - Denotes Decrease.	185 (Cont'd.)

ISSUED: July 8, 1968 EFFECTIVE: August 15, 1968

C. S. DEVOY
General Manager
802 - 25th Street
GALVESTON, TEXAS 77550

Issued by
CARL S. PARKER, JR.
Traffic Manager
802 - 25th Street
GALVESTON, TEXAS 77550

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BOARD OF TRUSTEES OF THE
GALVESTON WHARVES

TARIFF CIRCULAR NO. 4-D

Section 2

Charges which will be assessed against vessels or other parties engaged in the handling of import, export and Coastwise or intercoastal traffic, Also traffic to or from American Possessions .

SUBJECT	PIER DEMURRAGE RULES AND CHARGES	ITEM NO.
RULES AND CHARGES	(c) PIER DEMURRAGE RULES: (continued) (3) Galveston Wharves reserves the right to allow cargo to remain at initial point of rest, or move it at the risk and expense of the owner to another location on Galveston Wharves, or to a public or licensed warehouse, if space is available. (4) Cargo subject to pier demurrage and/or dreyage charges will not be released until satisfactory arrangements have been made by the owners, or their agents, with Galveston Wharves for payment of said charges. (5) Cargo placed in public or licensed warehouses under the provisions of Paragraph (3) is subject to a lien by Galveston Wharves for accrued charges.	185 (Cont.)

ISSUED: December 1, 1967

EFFECTIVE: January 1, 1968

C. S. DEVOL
General Manager
802 - 25th Street
GALVESTON, TEXAS 77550

Issued by
CARL S. PARKER, JR.
Traffic Manager
802 - 25th Street
GALVESTON, TEXAS 77550

APPENDIX H

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BOARD OF TRUSTEES OF THE GALVESTON WHARVES

FMC - T NO. 1

TARIFF CIRCULAR NO. 4-D

Section 2

Charges which will be assessed against vessels or other parties engaged in the handling of import, export and Coastwise or intercoastal traffic. Also traffic to or from American Possessions.

SUBJECT	PIER DEMURRAGE RULES AND CHARGES	ITEM NO.
RULES AND CHARGES	(c) PIER DEMURRAGE RULES: (continued) (3) Galveston Wharves reserves the right to allow cargo to remain at initial point of rest, or move it at the risk and expense of the owner to another location on Galveston Wharves, or to a public or licensed warehouse, if space is available. (4) Cargo subject to pier demurrage and/or drayage charges will not be released until satisfactory arrangements have been made by the owners, or their agents, with Galveston Wharves for payment of said charges. (5) Cargo placed in public or licensed warehouses under the provisions of Paragraph (3) is subject to a lien by Galveston Wharves for accrued charges. ♦ (6) For special provisions due to strike interference, see Item 187.	185 (cont.)
INTERFERENCE DUE TO STRIKE	When it is impossible to remove cargo from Galveston Wharves' piers or transit sheds because of strike interference, cargo on piers or in transit sheds within the free time period will be allowed additional free time equal to period of such interference. Cargo on piers or in transit sheds on which free time period has expired at beginning of such interference will be assessed pier demurrage during period of interference at rate of 3c per ton per day except cotton and cotton linters which will be assessed 3-1/2c per bale per day. The first and last day on which any strike interference occurred, such day will be included in the above special provisions.	♦ 187 New Item

♦ - Denotes Decrease.

ISSUED: May 28 1971

EFFECTIVE: July 9, 1971

C. S. DEVOY
General Manager
802 - 24th Street
GALVESTON, TEXAS 77550

Issued by
CARL S. PARKER, JR.
Traffic Manager
802 - 24th Street
GALVESTON, TEXAS 77550

APPENDIX I

PORT OF CORPUS CHRISTI
TARIFF NO. I-J

SECTION ONE: **FIRST REVISED PAGE 4**

RULES AND REGULATIONS

SUBJECT	RULES	ITEM
JURISDICTION OF NAVIGATION COMMISSION	The Navigation Commission has jurisdiction over and personal charge of all the water front and slips, turning basin, wharves, landings, appliances of all kinds whatsoever, within Nueces County Navigation District No. 1, and shall make and enforce such rules and regulations as may be necessary to promote order and facilitate traffic and business and to secure safety and equal conveniences to every user thereof, and all parties or persons and all water craft of any kind whatsoever must conform to the rules and regulations of the Navigation Commission when within the territory under its jurisdiction.	1
REMOVAL OF VESSELS	If it becomes necessary to expedite the business within the turning basin or at any wharf under the jurisdiction of the Navigation Commission, a vessel may be removed by or at the order of the Navigation Commission at the expense of the owner, provided notice to move shall first have been given to the master or person in charge of such vessel, and he or they shall have refused or failed to comply with the instructions, and the owner and the vessel shall be liable for all damage that shall arise thereby.	5
PAYMENT OF CHARGES AND RESPONSIBILITY THEREFOR; EXTENSIONS OF CREDIT; AND LIENS	Wharfage, wharf demurrage, car loading and unloading (when not absorbed by the ocean carriers) are due from the owner, shipper or consignee of the cargo, and shall be collected for and on behalf of the Navigation District by the vessel discharging or loading the cargo, or for which the cargo was received, through the vessel's owner, agent or other person duly authorized to do so, and such vessel and its owner and agent, jointly and severally, shall guarantee and be liable for the payment of such charges to the Navigation District whether or not collected by such vessel or its owner or agent. The use of the wharf or other terminal facility by the vessel or its owner or agent shall constitute acceptance and acknowledgment of this agency, guaranty and liability. All bills rendered by the Navigation District for wharfage, dockage, wharf demurrage, shed and/or wharf use hire, charges for providing water and electricity, charges for equipment rental, charges for cleaning wharves and sheds, charges for terminal storage, special services, other services and claims or for any causes whatsoever, are due and payable in cash upon presentation, unless arrangements for extension of credit are made. When credit arrangements have been made, any agents, owners, persons, firms or corporations receiving bills and failing to make full payment after presentation within the time permitted under the credit arrangements may be placed upon a cash basis. The Navigation District does not recognize the numerous shippers or consignees and cannot attempt to collect or assist in collecting any port invoices or bills which may be passed on to shippers and consignees by the vessel, its owner and agent. Such bills must be paid regardless of when the vessel, its owner and agents, are reimbursed. Any errors in bills will be rectified by the Navigation District. The Navigation District reserves the right to estimate and collect in advance all charges which may accrue against vessels, their owners and agents, or against cargo loaded or discharged by such vessels, or from other users of the facilities of the Navigation District, whose credit has not been properly established with the Navigation District. Use of such facilities may be denied until such advance payments or deposits are made. The Navigation District, at its option and subject to termination at its election, may at any time and from time to time extend credit to any user or other person conducting business with the Navigation District under the provisions of this tariff or amendments or reissues thereof by such user or other person establishing and maintaining financial responsibility acceptable to the Navigation District, or by posting and maintaining a single transaction or a period or an annual surety bond in form and content and with corporate surety acceptable to the Navigation District in amount equal to 125% of maximum liability on a single transaction or equal to an estimated period or estimated annual maximum liability. Further extension of credit may be suspended or terminated by the Navigation District subject to the establishment of added or extended credit acceptable to the Navigation District. The Navigation District reserves the right to apply any payments received against the oldest bills rendered against vessels, their owners and agents, or other users of the facilities. Presentation of bills to owners and agents of vessels or to stevedores is done as a matter of accommodation and convenience and shall not constitute a waiver of the liens for charges furnished a vessel for which the maritime law gives the lien.	*15

*Denotes Change

ISSUED: April 10, 1974 EFFECTIVE: May 10, 1974

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Supreme Court of the United States

October Term, 1974

NO. 74-908

KERR STEAMSHIP CO., INC., ET AL,
Petitioners,

versus

THE CITY OF GALVESTON,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CIVIL APPEALS FOR THE FIFTH CIRCUIT

BENJAMIN R. POWEL
McLEOD, ALEXANDER, POWEL & APFFEL, INC.
808 Sealy & Smith Professional Building
P. O. Box 629
Galveston, Texas 77550
Tele. No. AC-713, 763-2481

Attorneys for Respondent

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

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To The Honorable Chief Justice and Associate Justices of The Supreme Court of The United States:

Respondent, The City of Galveston, opposes the Petition for a Writ of Certiorari to the Court of Civil Appeals for the Fifth Circuit, and prays that such Petition be denied.

QUESTIONS PRESENTED

1.

(Responding to Petitioners' Questions 1, 2 and 4)

Whether the provisions of the Tariffs of the City of Galveston (Galveston Wharves), as to definition of the types of charges and as to responsibility for charges, is consistent with and not violative of the Federal Maritime Commission General Order No. 15 (46 C.F.R., Part 533).

2.

(Responding to Petitioners' Question 3)

Whether the Court of Appeals, in affirming the judgment below, properly found the Tariff unambiguous and the Petitioners bound by the plain language of the Tariff.

STATEMENT OF THE CASE

Petitioners' Statement of the Case is essentially correct, with some exceptions. First, Petitioners were not sued "individually as steamship agents," as stated by Petitioners. Petitioners were merely named defendants, alleging that defendants placed, or caused to be placed, on the docks of the Wharves cotton pending export, and such cotton was allowed by Petitioners to remain on the Wharves beyond the free time, incurring pier demurrage for which Petitioners are liable.

Secondly, Respondent disagrees with Petitioners' statement that demurrage charges were all billed to the "vessel, its owners and agents". In fact, demurrage charges were

billed and mailed to Petitioners, at Petitioners' office address, in substantially the following form:

"M/V 'SAKISHIMA MARU' and Owners
Kerr S/S Co., Cotton Exch. Bldg., Galveston, Texas".

NATURE OF THE CASE

This is merely a collection suit filed by the Port of Galveston against local steamship company agents (one of whom is not only the agent but also owner and operator of a steamship line), where The City of Galveston, hereinafter called "City", collected demurrage charges accruing on outbound cargos of cotton bales under duly published Port Tariffs issued by the City and filed with the Federal Maritime Commission in December, 1967.

THE TARIFFS

On December 1, 1967 the Board of Trustees of the Galveston Wharves, acting on behalf of the City, issued Tariff Circular No. 4-D, which Tariff contains rates, services, rules, regulations, charges and responsibility therefor governing the operation of the City's public Port and Wharves' facilities, the particular portions thereof relevant to this controversy being Item No. 5(g) and (l), Item No. 30 and Item No. 185. (Appendix G, pp. A-37 through A-43) (All references to Appendix are to the Appendix to Petitioners' Petition for Writ of Certiorari).

Item No. 5 of the Tariff defines "free time" and "wharf demurrage"; Item No. 185 establishes the amount of "free time" and establiishes wharf (pier) demurrage-charge rates at 2½¢ per bale per day for the first five (5) days after free time and a 5¢ per bale charge per day for each day thereafter until removed, and further pro-

vides, in Paragraph (c)(1) that pier demurrage charges on outbound cargo will be considered as for the account and responsibility of the vessel, her owners or agents, individually or collectively. (A-37 through A-43).

Under Section 1, General Information, Rules and Regulations, Item No. 30, the Tariff provides generally for responsibility for charges and provides that those using the Port facilities agree to be governed by the Rules and Regulations contained in the Port's Tariffs (A-40).

AGENTS' USE OF THE PORT'S FACILITIES

The Petitioners were furnished copies of the City's Tariffs shortly after the Tariffs were filed with the Federal Maritime Commission in December, 1967, so actual notice to the Petitioners is not an issue. The Petitioners involved in this proceeding are some of the steamship company agents located at the Port of Galveston. All except Lykes Bros. Steamship Co., Inc., act as steamship agent for numerous vessels and owners which dock at Galveston; but Lykes Bros. also owns and operates its own vessels which received some of the cotton in question (FF 2).

BILLING PROCEDURE

It is difficult, if not impossible, for the City to determine responsibility for accrued demurrage on export cargo as between the vessel, the agent, the shippers and/or freight forwarders (F.F. 7). Billings for Port charges have been made by the City in the same manner as heretofore described in Respondent's Brief since at least 1954, and the billing is in accordance with the Tariff provisions outlined therein. Billings by the City for such charges are made after departure of the vessel loading cotton bales, and it would thus be difficult, if not impos-

sible, for the City to determine which party is responsible for the accrual of demurrage in every case (FF 7). Charging the agents is the only practical manner of billing these charges (F.F. 7).

TARIFF APPLICATION DURING STRIKE

The Tariff in force at the time in question did not provide for a reduction or exemption of demurrage charges in the event of a strike. The City could have charged the full demurrage charges accruing, irrespective of the strike, but reduced the charges during the term of the strike, to eliminate the "penalty" portion of the charges, resulting in reduced demurrage charges to the Petitioners. The Trial Court found that such reduction of demurrage charges was rational, reasonable, non-discriminatory and in accordance with Federal Maritime Commission cases and rules pertaining to the accrual of demurrage charges during a strike (FF 13). The City assessed strike demurrage charges uniformly to all users of the Port (City's Exhibit 7).

Petitioners, in the Appendix to Petition for Writ of Certiorari, have appended. as Appendixes H and I, respective portions of the Tariff of The City of Galveston and the Port of Corpus Christi not in effect at the time of accrual of the charges and not placed in evidence before the Trial Court, which portions of Tariffs are irrelevant and should not be considered by this Honorable Court, since the Trial Court had no opportunity to pass on same as evidence. In fact, Appendix I purports to be a portion of the Tariff of the Port of Corpus Christi, which was not even involved in the litigation below and which was issued more than five (5) years after the cause of action made the basis of this suit arose.

REASONS FOR DENYING PETITION FOR WRIT OF CERTIORARI

1. The decision of the Trial Court below, affirmed by the Court of Appeals, is consistent with existing federal law and its application and interpretation by the Federal Maritime Commission, and presents no substantial federal question.

The Court below properly applied the plain language of the Tariff, to hold the Petitioners responsible for wharf demurrage charges.

The City, by reason of its operation of the Port of Galveston, is a marine terminal operator, as defined in Federal Maritime Commission Order No. 15 (46 C.F.R., Part 533), hereinafter referred to as "General Order No. 15", and, as such, even though not a common carrier by water, is required to duly publish and file its Tariffs with the Federal Maritime Commission. The City's duly filed and published Tariff is, therefore, aside from certain written Leases, the *only* instrument evidencing the myriad contractual responsibilities, duties and charges applicable between the City and literally hundreds of users of the Port. The Petitioners, as well as other agents, steamship companies, freight forwarders, shippers, importers and exporters, all operate in the Port of Galveston under its duly published Tariffs.

Petitioners below attacked the Tariffs, with regard to pier demurrage accruing in relation to the ILA strike, asserting that the charges for pier demurrage are not their responsibility, in spite of the fact that the Tariff clearly holds responsible for the charges the vessel, the owners and *their agents*, individually or collectively.

The Trial Court found, and the Court of Appeals affirmed, that the assessment of responsibility and thus liability under the Tariff is valid and enforceable.

The Tariff is consistent with and certainly not violative of General Order No. 15. General Order No. 15 requires only that marine terminal operators file rates, rules and regulations and charges with the Commission on or before their effective date; post their Tariffs of rates, rules and regulations at their place or places of business; and include in their Tariffs either the definitions of services set forth in Section 533.6 or other definitions, with appropriate explanations of how they differ from the definitions contained in General Order No. 15.

The definition of "wharf demurrage" and "free time" in the City's Tariff is identical to that prescribed by General Order No. 15.

The Commission's General Order No. 15 makes no other requirement of a Port's or marine terminal operator's Tariffs, other than they be timely filed with the Commission, in order to enable the Commission to discharge its responsibilities under Section 17 of the Shipping Act of 1916, by keeping informed of practices and rates and charges related thereto and be in a position to insure that the Tariffs and Port practices thereunder are just, reasonable and non-discriminatory.

Tariff provisions pertaining to billing procedures and the legal responsibilities of persons and agencies operating at the Port and using the Port facilities are left by the Commission to the Port to determine, establish and publish in the Port's respective Tariffs, always, of course, subject to review by the Commission, to insure that the rates, rules and regulations contained in said Tariffs are

just and reasonable, in accordance with Section 17 of the Shipping Act of 1916.

The Federal Maritime Commission has, in fact, in the past, specifically investigated in a formal proceeding the validity of the City's Tariff No. 4-B (predecessor of 4-D), in *Selden & Co. v. Trustees of Galveston Wharves,* 7 FMC 679 (1964), and the Commission found lawful a Tariff Amendment, whereby the City increased demurrage charges by mere publication of the Tariff providing for such increase, the Commission specifically holding that the Tariff Amendment issued and filed with the Commission was in effect and binding upon Selden & Co. The provisions of Tariff No. 4-B, affixing responsibiliy for charges accruing under said Tariff, are identical to the like provisions of Tariff No. 4-D, the former being construed and held enforceable and binding by the Federal Maritime Commission in *Selden & Co. v. Trustees of Galveston Wharves,* supra.

The Federal Maritime Commission appeared as Amicus Curiae in *Rorie v. City of Galveston,* 471 S.W.2d 789 (Tex. Sup. 1971), cert. den'd, 405 U.S. 988, 31 L.Ed.2d 454, in which the Texas Supreme Court held that the City's Tariff No. 4-B (predecessor of Tariff No. 4-D) was effective and enforceable upon the filing with the Commission. The theory advanced and rejected by both the Commission and the Courts, in *Rorie,* supra, was that the City of Galveston's Tariff constituted "an agreement", requiring formal Federal Maritime Commission approval, pursuant to Section 15 of the Shipping Act of 1916 (46 U.S.C. 814). The Court, in *Rorie,* like the Federal Maritime Commission in *Selden & Co.,* found the Tariff to be effective and enforceable upon filing with the Commission.

Petitioners urge that the mere filing of a Tariff does not make enforceable any part of the Tariff which is unlawful. Respondent has no argument with that statement; however, the Tariff in question has been found to be lawful by the Court in *Rorie v. City of Galveston*, by the Federal Maritime Commission in *Selden & Co. v. Trustees of Galveston Wharves*, and by the Courts below.

These holdings are certainly not in conflict with this Court's Opinion in *Boston & Maine RR v. Piper*, 246 U.S. 439, 62 L.Ed. 820 (1918). The Court, in *Piper*, considered an action by a cattle shipper against a rail carrier to recover for loss occasioned by carrier's delay in delivery of cattle resulting from carrier's negligence. Carrier defended on the basis of a special Contract with the shipper, limiting carrier's liability under the Cormack Amendment to the Interstate Commerce Act from loss caused by unusual delay, in consideration of shipping the cattle under a reduced rate.

This Honorable Court held that parties to a Bill of Lading involving an interstate shipment under Tariffs duly filed with the Interstate Commerce Commission are bound by the stipulations of the Bill af Lading and the filed Contract, and that the insertion of a limitation of liability provision in the Bill of Lading and Tariff by the carrier contravened the Cormack Amendment, providing that the carrier may not exonerate itself from its own negligence (with certain lawful exceptions). The Court did, of course, point out that the mere filing with the Interstate Commerce Commission of a Tariff containing an unlawful provision did not become lawful merely by reason of such filing.

The *Piper* case is irrelevant to the case at hand and clearly distinguishable. Piper and the B & M were parties to a Bill of Lading Contract involving an interstate shipment subject to the Interstate Commerce Act; the exculpatory or limitation of liability clause added by the rail carrier was prohibited by the Cormack Amendment to the Interstate Commerce Act. By comparison, the applicable portions of the City's Tariff do not involve an exculpatory clause; Petitioners and Respondent were not parties to a Bill of Lading Contract; and the City was operating only as a terminal operator, not as a common carrier.

The holding of the Court, in *Port of Tacoma v. SS DUVAL*, 364 F.2d 615 (9th 1966), though cited by Petitioners, does not support Petitioners' position. The Court, in *Port of Tacoma*, supra, merely held that provisions of a Port Tariff purporting to give the Port a lien did not give constructive notice of the lien provision of the Tariff to the owner of a vessel in derogation of the owner's no-lien rights under its Charter. The Port's lien provision contravenes the provisions of the Maritime Act, 46 USC, Sections 971-975; and, therefore, the owner's no-lien rights under its Charter, as provided in the Maritime Act, control. The case before this Court is substantially dissimilar to the *Port of Tacoma* case, supra, in that this case does not involve either constructive notice or assertion of a lien. The provisions of the City's Tariff as to responsibility for charges are not in violation of either the Maritime Act, the Shipping Act of 1916 or the Rules and Regulations of the Federal Maritime Commission.

Petitioners urge that Port terminal Tariffs are treated differently than common-carrier Tariffs. Respondent agrees

that there are certain differences, in that a Port's Tariff applies generally to all users of the Port whereas the carrier's Tariff applies to parties to a Bill of Lading Contract. A public Port, being a marine terminal, does not contract with each and every person using its services or wharf facilities, but merely issues its Tariffs, outlining the rules and regulations, charges and responsibilities, therefor, which apply uniformly to all persons availing themselves of the public Port facilities.

Cases involving common carrier liability under Tariffs filed pursuant to the Interstate Commerce Act are not necessarily binding on Federal Maritime Commission rules regarding marine terminal operators. *American Export-Isbrandtsen Lines, Inc. v. Federal Maritime Commission,* 444 F.2d 824 (C.A. D.C. 1969).

The enforceability of marine terminal operator Tariffs in the same manner as Tariffs of common carriers was discussed in *State of Israel v. Metropolitan Dade County, Florida,* 431 F.2d 925 (C.A. 5th 1970), which was a case involving suit by a marine terminal operator against a vessel owner for dockage charges. The Court said:

> "As with taxes, we start with the proposition that morality, equity or the invidious reflex of each has no part in Tariff application. A Tariff required by the appropriate regulatory statute (CFR Secs. 532.2, et seq., 1970), like the law of the Medes and Persians, which alterath not, is more than an essential Contract. *It has the force of law with the analogous dignity of a statute.* (Emphasis added) *Venezolana De Navegacion v. A. J. Perez Export Co.,* 303 F.2d 692 (C.A. 5th 1962), and see especially Note 12, 1962 AMC 1710, cert. den'd., 371 U.S. 942, 9 L.Ed.2d 276".

2. The Court of Appeals, in affirming the judgment below, properly found the Tariff unambiguous and the Petitioners bound by the plain language of the Tariff.

Petitioners go to great lengths to try to create in the minds of the Court an ambiguity in the Tariff, where none exists, to escape liability for these demurrage charges. Petitioners apparently urge that the definition of wharf demurrage under Item 5 of the Tariff assesses liability and responsibility for demurrage charges upon the owners of the cotton, even though Item 5 merely defines the service for which a charge is made and even though, as a practical matter, it would be impossible for the Port of Galveston to know what particular person or company owned the cotton at any given time. The City of Galveston is not privy to Sales Contracts and Agreements between shippers and ultimate consignees of export cotton and obviously has no way of knowing when title and thus ownership to to cotton has passed.

The Trial Court properly found that the disputed Tariff items are unambiguous. The Trial Court found, as a conclusion of law, that, under the Tariff, pier demurrage charges for cargo remaining beyond free time may be assessed against the vessels and their agents. The Trial Court further found, as a conclusion of law, that the definition of pier demurrage in Item No. 5 of the Tariff deals only with the manner in which charges are accrued, and does not purport to establish which parties are liable for the charges, finding such Items neither conflicting nor ambiguous (C/L).

The Courts below, therefore, merely applied the clearly stated language of the Tariff. Item No. 5 merely *defines*

pier demurrage as a charge assessable against the cargo and does not speak to the question of liability or ultimate responsibility for the charges. Item No. 5 of the Tariff merely defines the *basis for the accrual* of said charges. Item No. 30 of the Tariff, however, provides, under the subject "Responsibility For Charges, Etc.", that the use of the waterways and facilities of the City's Port facility shall constitute a consent to the terms and conditions of the Tariff and an agreement on the part of the vessels, their owners and agents, and other users of the facility, to be governed and bound by the rules and regulations contained in the Tariff. Particular responsibility for pier demurrage charges is provided under Section 2, "Subject Rules and Charges", Item 185(c)(1), to-wit:

> "Pier demurrage charges on outbound cargo will be considered as for the account and responsibility of the vessel, their owners or their agents, individually or collectively".

Respondent acknowledges the general rule of construction in favor of shippers pertaining to carrier's Tariffs, which, in general, apply to ambiguously stated commodity descriptions and rate application. For example, in *United States v. Gulf Refining Co.*, 268 U.S. 542, 69 L.Ed. 1082 (1925), this Court considered a case in which Gulf Refining was convicted of receiving concessions and discriminating in rates on gasoline shipped, in violation of the Elkins Act of 1903 (providing that it be unlawful to discriminate or receive rebates from filed Tariff rates). The question there involved was a description of the commodity shipped, i.e., whether "unrefined naptha", commanding a lower rate, or "gasoline", commanding a higher rate.

The Court held that, where a commodity is included in more than one Tariff designation, that designation which is more specific will be held applicable. The Court further held that where two descriptions of commodities in a Tariff are equally appropriate, the shipper is entitled to have applied the description specifying the lower rate.

Atlantic Coast Line RR Co. v. Atlantic Bridge Co., 57 F.2d 654, (C.A. 5th 1932), is also a rate case, involving the classification of a commodity shipped as falling under different Tariff classifications, with responding differences in rates. The shipper obtained an Interstate Commerce Commission Reparation Order, which Reparation Order was affirmed and enforcement ordered by District Court. To the railroad's appeal, the Court said:

> "Tariffs, like statutes, have the force of law. Like statutes, they must be expressed in clear and plain terms, so that those dealing with and governed by them may understand them and act advisedly. They may not be contrived in catch-penny terms to catch the ignorant and unwary. If they are ambiguous or permit of two meanings, the shipper may construe them in the most favorable way to himself which the terms permit. The intention thus manifested in the words of the Tariff is *alone* the intention to which the law gives effect".

The Court found that the classifications, as used in the Tariff and applied to the commodities shipped, dictated against the carrier's position, irrespective of the carrier's intent.

Respondent has no argument with these cases and their holdings. The Courts below found neither conflict nor ambiguity in the City's Tariff. The subject matter does

not involve the question of application of varying rates to particular commodities. Thus, the cited Tariff construction cases are just not authoritative for the construction proposition advanced by Petitioners.

Petitioners claim agency insulation from liability on the grounds that the Petitioners were not parties to Bills of Lading covering the cotton cargo on the Wharves and that Petitioners were acting for disclosed principals. The fact that Petitioners are not parties to any Bill of Lading Contract concerning cargo on the Wharves is immaterial. Respondent City, likewise, is not party to any Bill of Lading Contract pertaining to the goods on its Wharves, and does not rely upon any Bill of Lading provision for the enforcement of its marine terminal Tariff, since Respondent is not acting as a common carrier in regard to furnishing wharf and pier facilities at its Port.

Petitioners failed to prove and failed to secure Finding of Fact that, with regard to the demurrage bills sought to be collected by the City, Petitioners disclosed to the City any particular principal for whom each Petitioner purported to act as agent at or prior to the time that the demurrage charges accrued, and, therefore, the City was not furnished knowledge of any particular agency relationship. Mere proof that Petitioners, other than Lykes Steamship Co., Inc., which acted in its own behalf, generally represented steamship companies or vessels is not sufficient to show that Petitioners disclosed the principal for which Petitioners purported to act in arranging for the berth and use of the wharf space for cotton.

In any event, the theory of insulation of the Petitioners on the disclosed principal theory is immaterial, since the City's Tariff specifically and particularly holds the vessel,

its owners and agents, individually and collectively, responsible for the accrual of pier demurrage charges on outbound cargo.

That portion of the City's Tariff establishing responsibility for charges is lawful. The procedure of billing the Petitioners-Agents who arranged for the use of the Wharf facilities has been followed at the Port of Galveston since 1954. The Trial Court found that it would be difficult, if not impossible, for Respondent to determine which party is responsible for the accrual of demurrage in every instance; that determining which shipper owned a particular cargo would be time consuming; and that charging the Petitioners is the only practical manner of billing the expense (FF 7). The City's Tariffs are uniformly applied to all who use the City's port facilities, and the City has not discriminated in applying its duly published and filed Ttriffs. Therefore, the Tariff, until changed or modified, binds all parties with the force of law. *River Terminals Corp. v. Southwest Sugar & Molasses Co.*, 253 F.2d 922 (5th Cir. 1958).

The Federal Maritime Commission, which is vested with primary jurisdiction to review, interpret and, when necessary, to order Amendment or Modification of Tariffs filed with it, in *Selden & Co. v. Trustees of Galveston Wharves*, supra, held to be effective and binding the language in a predecessor Tariff, identical to Item No. 30 in the present Tariff. Further, the Commission, by reason of its Amicus Curiae Brief in *Rorie v. City of Galveston*, supra, had another opportunity to review the City's Tariff, and reasserted the Commission's view that Section 15 of the Shipping Act does not apply to the City's Tariff.

Although the Courts are the final authority on issues of statutory construction, *FTC v. Colgate-Palmolive*, 380

U.S. 374, 385 (1965), the construction put on a statute by an agency charged with administering it is entitled to deference by the Courts. *NLRB v. Hearst Publications*, 322 U.S. 111, 131 (1944).

Respondent has no quarrel with the holdings of Petitioners' cited cases of *Louisville & Nashville RR Co. v. Maxwell*, 237 U.S. 94 (1915), or *Lowden v. Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. 516 (1939). These cases merely hold that, until changed, Tariffs bind both carriers and shippers with the force of law.

Middle Atlantic Conference v. United States, 353 F. Supp. 1109 (D.C. D.C. 1972), is *not* a decision directly responsive to this Tariff question, and does *not* directly apply to the circumstances in the instant case. The *Middle Atlantic Conference* case considers the right of a common carrier, a party to a Bill of Lading Contract, to extend liability beyond the parties to the Bill of Lading Contract (i.e., warehousemen, brokers, pier operators, etc., for detention charges on trucks being loaded and unloaded at the premises).

The District Court there considered an appeal from an Order of the Interstate Commerce Commission, construing a ruling of the Interstate Commerce Commission on a proposed extension of liability for charges in a motor carrier's Tariff to apply to parties not privy to the Bill of Lading Contract, the Commission applying the provisions of 49 U.S.C. Sec. 317(a).

The Commission ordered, and the Court affirmed, that the insertion of Tariff provisions of motor and rail carriers attempting to place liability for detention charges on persons not parties to the Contract of transportation is unlawful. The *Midatlantic Conference* case, supra, is just not

authority on the question before this Honorable Court. The City is merely a terminal operator and not a common carrier or party to a Bill of Lading Contract. The Port is subject to the primary jurisdiction of the Federal Maritime Commission under the Shipping Act of 1916, whereas the carriers in the *Midatlantic Conference* case, supra, are bound by the provisions of the Interstate Commerce Act. The Court further recognized that, in transportation Contracts of rail and motor carriers, the Contract of carriage is directly with the shipper, unlike maritime demurrage. The City, as a marine terminal operator, has no direct contact with shippers, is not party to any Bill of Lading Contract for transportation of goods, and has, as its only instrument evidencing rates, charges and responsibilities of persons using the public Port, its duly filed and published marine terminal Tariffs.

Petitioners even complain of the City's elimination of the "penalty" portion of the pier demurrage during the ILA strike, which resulted in a considerably lesser amount of demurrage being owing by Petitioners than if the "penalty" poriton of the pier demurrage charges would have been assessed during the duration of the strike. The Trial Court found, and the Court of Appeals affirmed, that Respondent's assessment of reduced rates during the strike, even though under the Tariff Respondent could have charged demurrage at the usual, gradually increasing rate, was rational, reasonable and non-discriminatory (F.F. 12 and 13).

The City's elimination from its Tariff charges of the "penalty" portion of its demurrage rate, charging only the "compensatory" portion of the demurrage rate was found to be reasonable by the Trial Court. The City is required by law to charge and collect demurrage charges which are

compensatory. *California v. United States*, 320 U.S. 577, 88 L.Ed.322 (1944). However, the Federal Maritime Commission has, since 1948, held that a terminal operator, such as the City of Galveston, shall charge the compensatory portion of its demurrage rates which accrue during the period when the Port is struck, but shall not charge the penalty portion of the demurrage rate. *Free Time and Demurrage Charges—New York*, 3 USMC 89 (1948). In *Free Time and Demurrage Charges — New York*, supra, the Commission said that demurrage charges have:

> "a dual composition, consisting of an element of compensation for the storage of property, and an element of penalty to induce its removal. . . . When property lies at rest on a pier after free time has expired, and consignees, through reasons beyond their control, are unable to remove it, the penal element of demurrage charges assessed against such property has no effect in accelerating clearance of the pier. To the extent that such charges are penal, i.e., in excess of a compensatory level, they are useless and subsequently unjust burdens upon consignees and a source of unearned revenues to carriers. The levying of such penalty charges, therefore, constitutes an unjust and unreasonable practice in connection with the storing and delivering of property, and should be forbidden".

Accordingly, the City's reduction of its demurrage charges during the strike period to eliminate the "penalty" portion of the charge was found by the Court to be not only rational, reasonable and non-discriminatory, but such reduction of demurrage charges by the City was in accordance with the legal precedent established by the Federal Maritime Commission.

CONCLUSION

WHEREFORE, the ruling of the Trial Court and affirmation by the Court of Appeals being in accordance with established Federal law and the regulations and rulings of the Federal Maritime Commission, and no substantial Federal question having been presented in the Petition for Writ of Certiorari, Respondent respectfully prays that Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit be denied.

Respectfully submitted,

BENJAMIN R. POWEL
McLEOD, ALEXANDER, POWEL & APFFEL, INC.
808 Sealy & Smith Professional Building
P. O. Box 629
Galveston, Texas 77550

Attorneys for Respondent, The City of Galveston

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Civil Appeals for the Fifth Circuit has this _____ day of February, 1975, been forwarded to the Attorney for Petitioners, Mr. Robert Eikel, Messrs. Eikel & Davey, 1442 Esperson Building, Houston, Texas 77002, Certified Return Receipt Requested.

BENJAMIN R. POWEL